No. 10445.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BENJAMIN ROSE and LOUIS VITAGLIANO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

CHARLES H. CARR,
United States Attorney;
JAMES M. CARTER,
Assistant United States Attorney;
ERNEST A. TOLIN,
Assistant United States Attorney,
United States Postoffice and Courthouse Bldg., Los Angeles (12),
Attorneys for Appellee.

FILED
DEC - 7 1944
PAUL P. O'BRIEN,
CLERK

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES. PAGE

MISCELLANEOUS.

STATUTES.

INDEX TO APPENDICES.

No. 10445.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BENJAMIN ROSE and LOUIS VITAGLIANO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Basis of Jurisdiction.

A. The District Court had jurisdiction to try the case under the authority of Title 18, United States Code, Section 88, and of Title 28, United States Code, Section 41, Subdivision 2.

B. The Indictment charged that appellants, together with five others, also made defendants, violated Title 18, United States Code, Section 88, in that commencing on or about December 12, 1941 and continuing until the return of the Indictment, and within the County of Los Angeles, State of California, Southern District of California, Central Division, said defendants conspired to commit offenses against the United States, that is to say, to sell, trade, lease, ship and transfer new rubber tires and tubes to consumers in violation of several statutes mentioned in the Indictment.

C. This Court has jurisdiction of the appeal under the provisions of Title 28, United States Code, Section 225 (a) and (d).

Statement of the Case.

This is an appeal by Benjamin Rose and Louis Vitagliano from a judgment after a trial in the District Court at which appellants and three others were convicted of the offense charged in Count I of a two count Indictment.

At the conclusion of the Government's case appellants moved the Court to require the Government to elect between Counts I and II. Said Motion was granted and the Government elected to proceed on Count I whereon the Court dismissed Count II. Defendants were convicted. Appellant Benjamin Rose was sentenced to imprisonment for a term of one year and one day in a penitentiary and to pay a fine of two thousand dollars ($2,000.00). Appellant Louis Vitagliano was sentenced to imprisonment in jail for a term of six months, and to pay a fine of one thousand dollars ($1,000.00).

Appellants filed separate Notices of Appeal. Thereafter the trial court, upon stipulation made its order that the appeals of said appellants be tried together and that one Bill of Exceptions be filed for both of said appellants.

Questions Involved in the Appeal.

It appears from appellants' brief that they rely upon six basic challenges which present the following questions:

A. Does the Indictment state an offense against the laws of the United States?

This question is raised by:

1. An exception to the overruling of appellant's Demurrers.

2. An exception to the overruling of appellants' Motions In Arrest of Judgment.

B. Did the Court abuse its discretion in denying the appellants' Motion For a Bill of Particulars?

C. Should the Court have granted the Motion of Appellants to Dismiss at the close of the opening statement?

D. Was the evidence sufficient to justify the verdict?

E. Did the Court err in refusing to strike certain evidence?

F. Is the Second War Powers Act constitutional?

The Facts.

The testimony, as it appears in the Bill of Exceptions, covers 224 pages. In the Supplement to Appellants' Brief it has been condensed into 98 pages. Appellee does not believe that the supplement states the evidence completely or with sufficient detail to adequately illustrate the case. Under Section IV of their brief appellants argue that the evidence is insufficient to support the verdict.

It has been found impossible to concisely restate the evidence without materially detracting from the complete record. Therefore, appellee adopts by this reference thereto the evidence as set forth on pages 126 to 340, inclusive, of the Bill of Record. In Section IV of appellee's brief the attention of the Court is particularly directed to evidence which establishes the several elements of the crime of which appellants have been convicted.

ARGUMENT.

I.

The Indictment Adequately States an Offense Against the Laws of the United States.

A. Appellants complain that the Indictment alleges that a conspiracy commenced on December 12, 1941, and that the Second War Powers Act mentioned in the Indictment was not adopted until March 27, 1942. Appellants through their brief refer to the Indictment as one charging a conspiracy to violate the Second War Powers Act and as if that were the only law they conspired to violate. This view of the Indictment overlooks Paragraphs 2 to 11, inclusive. A reading of said paragraphs discloses that as early as June 28, 1940 Congress adopted a law entitled "An Act to Expedite National Defense And For Other Purposes" which Act was amended on May 31, 1941 (Public Law 89, 77th Cong. Ch. 157, 1st Sess. H.R. 4534-55 Stat. 236, 1941). The pertinent portions of said Act are printed as Appendix A. Although the Second War Powers Act did not become a law until March 27, 1942 a rationing of rubber tires and tubes was embodied in the law of the land under the authority of the predecessor of the Second War Powers Act, to-wit, the aforesaid Public Law No. 89 printed herein as Appendix A.

The Indictment simply charges that a conspiracy commenced on or about December 12, 1941, at which time the prohibition against unrestricted sales and deliveries of rubber tires and tubes was controlled by the authority of "An Act To Expedite National Defense And For Other Purposes," as amended by the aforesaid Public Law No. 89.

The conspiracy continued down to the date of the return of the Indictment (January 27, 1943). During the term of the conspiracy the Second War Powers Act was adopted and during the later months of the conspiracy a prohibition of wrong doing flowed from the Second War Powers Act whereas during the first months of the conspiracy the rationing authority was grounded upon the earlier statute.

In view of the fact that the Second War Powers Act was preceded by the aforesaid earlier statutes, it is not sound argument on appellants' behalf, that the conspiracy was but a lawful agreement when entered into. Further, the Second War Powers Act was adopted March 27, 1942. The Indictment alleged that the conspiracy continued up to and including the date of the return of the Indictment. It was returned and filed January 27, 1943. All of the overt acts pleaded, and many of the overt acts proved occurred after the enactment of the Second War Powers Act.

However, it has often been held that a conspiracy may commence prior to the enactment of a law which the conspirators seek to violate, and such a conspiracy is indictable if it continues to exist after its objects become unlawful.

In *Bailey v. United States*, 5 F.(2d) 437 (C. C. A. 5th 1925), in which the Court declared:

> "Although the indictment alleges that the conspiracy was formed before the passage of the Revenue Act of 1922, the overt acts to effect its objects are alleged to have been committed after the passage of that act, and the indictment charges a continuing conspiracy. The overt acts were sufficient to keep the conspiracy alive."

In *Nyquist v. United States*, 2 F.(2d) 504 (C. C. A. 6th 1924), defendants were prosecuted for a conspiracy to violate the Dyer Act. The Court said:

> "It was permissible to show that the fraudulent agreement was entered upon long before the Dyer Act took effect, and was kept up after the passage of that act."

In *Butler v. United States*, 138 F.(2d) 977 (C. C. A. 7th 1943), defendants were charged with conspiracy to violate the provisions of the Selective Training and Service Act of 1940. The opinion includes the following:

> "The point is made that the second count of the indictment is invalid, in that it designates the date of the beginning of the offense prior to the effective date of the Selective Training and Service Act of 1940.
>
> "(10) We think there is no merit in this contention, since the law is well settled that where the indictment—and such is the fact in this case—contains an allegation of the continuance of the conspiracy subsequent to the passage of the statute and up to the date of the indictment, and there is evidence of acts constituting part of the conspiracy having been committed after the effective date of the statute, the indictment is not invalid."

In *Schefano v. United States*, 84 F.(2d) 513 (C. C. A. 5th 1936), defendants were prosecuted for a conspiracy to commit offenses against the United States by evading certain liquor tax laws. The opinion contains the following:

> "It is contended that the indictment charges a conspiracy on January 1, 1934 to violate the liquor

taxing act of 1934 and, as the statute was not adopted until January 11, 1934, the indictment is void. This overlooks the allegation that the conspiracy was continuing until October 1, 1935 * * * The government was not bound to show the conspiracy began on January 1, 1934. It was sufficient to prove its existence when the law was in effect."

B. The Indictment is attacked by appellants as vague, indefinite and uncertain, and further that the references to the ration orders are general. The Indictment undertakes to charge the appellants with a conspiracy rather than with a substantive offense. The charging language is as follows:

[R. 77.] "Did unlawfully, wilfully, knowingly, corruptly, fraudulently and feloniously engage in a conspiracy to commit offenses against the United States, that is to say, to sell, trade, lease, ship and transfer new rubber tires, casings and tubes to consumers and other persons in violation of the statute, executive orders, regulations and directives hereinbefore referred to."

On December 10, 1941, two days prior to the beginning of the conspiracy the Office of Production Management issued its order entitled "Supplementary Order No. M-15-b." The pertinent portions thereof are annexed hereto as Appendix B. This order contains the following:

"(c) *General Restriction on Sales and Shipments.* Except to fill purchase orders assigned an A-e or better Preference Rating, from the date of issuance of this Order until Monday, December 22, 1941, no new automobile, truck, bus, or motorcycle, farm implement, or other type of casing or tube, shall be

sold, leased, traded, delivered or transferred: Provided, That the foregoing prohibition shall not apply to tires which are sold as a part of new or used vehicles being sold and which are affixed to such vehicles at the time of their sale. And also, no person shall ship or permit to be removed from his plants, warehouses, or other places of storage, during any calendar month, beginning with the month of December 1941 quantities of any class or type of rubber goods other than tires at a rate in excess of the rates of shipment or removal of similar classes or types of rubber goods during the month of November 1941 to fill purchase orders not assigned a Preference Rating of A-10 or better, except for the purposes of filling purchase orders assigned a Preference Rating of A-10 or better."

On December 19, 1941, Donald M. Nelson as Director of Priorities, issued Amendment No. 1 to Supplementary Order No. M-15-b. The pertinent portions thereof are annexed hereto to Appendix C. Said order contained the following:

"(c) *General Restriction on the Sale of Tires,* Except to fill purchase orders assigned an A-3 or better Preference Rating, from the date of issuance of this Order until January 5, 1942, no new automobile, truck, bus, motorcycle, farm implement, or other type of tire, tire casing or tire tube, other than bicycle tires, shall be sold, leased, traded, delivered or transferred by any person, provided that the foregoing prohibition shall not apply to tires which are sold as a part of new vehicles being sold and which are affixed to such vehicle at the time of their sale."

On December 27, 1941, Donald M. Nelson as Director of Priorities, issued Supplementary Order No. M-15-c to Restrict Transactions in New Rubber Tires, Casings and Tubes. The pertinent portions are annexed hereto as Appendix D, which Order contained the following:

> "(c) *Prohibition on Deliveries of New Rubber Tires, Casings, and Tubes Except to Persons Possessing Certificates.* (1) Except as provided in this paragraph and in paragraphs (g) and (h) hereof, or in regulations hereafter issued by the Office of Price Administration, no person shall sell, lease, trade, lend, deliver, ship, or transfer new rubber tires, casings, or tubes, and no person shall accept any such sale, lease, trade, loan, delivery, shipment or transfer of any such new rubber tires, casings, or tubes. (The provisions of this paragraph shall apply to all new rubber tires, casings, and tubes, whether such new rubber tires, casings, and tubes are at the date of issuance of this Order already manufactured, or whether such new rubber tires, casings, and tubes are manufactured in the future.)"

The Order, in its subdivision (e), provides in detail for the determination by the Office of Price Administration of applications for a certificate permitting certain persons to purchase and accept delivery of new rubber tires, casings or tubes and concludes in paragraph (6) of said subdivision (e) with the following:

> "* * * Such certificate shall be recognized by any person having new rubber tires, casings, or tubes for sale, and no sale, lease, trade, loan, delivery, shipment or transfer of new rubber tires, casings, or tubes (except as provided in paragraphs (c), (g), and (h) hereof) shall be made except on the basis of such a certificate."

On December 30, 1941, the Office of Price Administration, Leon Henderson, Administrator, issued rubber tire regulations. The pertinent portions are annexed hereto as Appendix E. Said portions contain certain prohibitions against the sale and transfer of new tires and tubes among which are the following:

"Eligibility to Purchase or Transfer New Tires or Tubes

"Sec. 1315.401. *Permitted and Prohibited Transfers*—(a) *Prohibitions.* Except as provided in paragraphs (b) and (c) of this section, no person shall sell, lease, trade, lend, deliver, ship or transfer new tires or tubes, and no person shall accept any such sale, lease, trade, loan, delivery, shipment or transfer of any such new rubber tires or tubes. The word transfer includes any form of physical transfer, including gifts.

"(1) The prohibition in this paragraph (a) applies both to sales and to deliveries. Except as provided by paragraphs (b) and (c), it is unlawful to deliver new tires or tubes to a person even though such person has completed and paid for the purchase or agreement for transfer of new tires or tubes from the person to whom delivery is requested.

"(2) The prohibition in this paragraph (a) applies not only to the transfer of tires or tubes from one person to another, but also to the delivery by any person from a factory, warehouse, or other premises to retail store, operated or controlled by such person.

"(3) Authorizations to manufacturers and distributors to make deliveries prohibited by this section from factories and warehouses to retail stores, outlets and premises may hereafter be granted by the Office

of Price Administration. The purpose of such authorization, when granted, will be to enable dealers to replenish inventories of new tires or tubes. In order to accomplish that purpose, permitted shipments to dealers will be based upon certificates and receipts issued pursuant to Secs. 1315.601 to 1315.607, inclusive, and to paragraph (c) of this section of these regulations. Such certificates and receipts shall be transmitted by dealers in accordance with instructions which will hereafter be issued by the Office of Price Administration.

"(4) The prohibition in this paragraph (a) applies to all new tires and tubes, whether such new tires and tubes are, at the date of the issuance of this order, already manufactured, or whether such new tires or tubes are manufactured in the future."

On January 16, 1942, the President issued Executive Order No. 9024 establishing the War Production Board. Said Order is printed as Appendix F to this brief, and on January 24, 1942, by Executive Order No. 9040, the President directed that the War Production Board perform the functions and exercise the powers theretofore vested in the Office of Production Management. Said Executive Order is printed as Appendix G to this brief.

On January 24, 1942, the War Production Board authorized the Office of Price Administration to perform certain functions with respect to the exercise of rationing control. Said Directive is printed as Appendix H to this brief.

On February 18, 1942, Leon Henderson as Administrator of the Office of Price Administration, issued an amendment to revise tire rationing regulations which is

printed as Appendix I to this brief, and which contain the following:

> "Sec. 1315.801. Except as provided in paragraphs (b) and (c) of this section and in Secs. 1315.801 to 1315.805, it is unlawful to transfer new tires or tubes, or deliver retreaded or recapped tires, to a consumer, even though such consumer has completed and paid for the purchase or agreement for transfer of such tires or tubes from the person of whom delivery or transfer is requested."

All of the foregoing regulations were specifically referred to in the Indictment and the Indictment charged that the appellants conspired to "commit offenses against the United States, that is to say, to sell, trade, lease, ship and transfer new rubber tires, casings and tubes to consumers and other persons in violation of the statute, executive orders, regulations and directives hereinbefore referred to." It is, therefore, certain that the conspiracy charged was one which offended against the regulations which were in existence under authority of the statutes. Appellants contend that as there were many exceptions under the regulations which entitled dealers to sell and transfer new tires and tubes that it has not been charged that the things which appellants conspired to do offended the regulations. It is impossible to reconcile this contention as flowing from an understanding of the Indictment, for the Indictment alleges not only that the appellants conspired unlawfully, knowingly, corruptly, fraudulently and feloniously, but that they conspired to "sell, trade, lease, ship and transfer new rubber tires, casings, and tubes to consumers and other persons in violation of the statute, executive orders, regulations and directives hereinbefore referred

to." The language just quoted indicates that appellants are not charged with conspiring to make the sales and transfers permitted, but rather that they were charged with conspiring to make the sales and transfers which were prohibited.

It has long been the law that it is unnecessary to negative the exceptions to the statute. A parallel exists in the language of the National Prohibition Act conspiracy cases of which *Davis v. United States,* 274 Fed. 928 (C. C. A. 9th 1921), is an example. Defendants were charged with conspiring to commit the offense of "knowingly, wilfully, and unlawfully transporting, selling, bartering, furnishing, and possessing intoxicating liquor, namely, whisky, in violation of the National Prohibition Act * * *." Following conviction a motion was made in Arrest of Judgment and the denial of that motion was the only error assigned and before the Court of Appeals. The Court treated the subject as follows:

> "It is contended that it is fatally defective, in that it fails to allege that the liquor, the transportation of which was the object of the conspiracy, was not to be used for nonbeverage purposes, under the provisions of section 3 of title 2 of the act. The plaintiffs in error cite authorities to the proposition that where a statute in defining an offense 'contains an exception or proviso in its enacting clause which is so incorporated with the language describing and defining the offense, that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, it must be shown that the accused is not within the exception,' citing 14 R. C. L. 188. But the text-writer so quoted goes on to say:

> 'On the other hand, if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense and must be shown by the accused.'
>
> We think the present case comes clearly within the rule last quoted. * * *"

To like effect is *Hockett v. United States,* 265 Fed. 588 (C.C.A. 9th 1920). The Indictment was demurred to but held sufficient. The Indictment charged that the defendants conspired to commit an offense against the United States, "that is to say, to wrongfully, unlawfully, and feloniously transport, and cause to be transported, in interstate commerce, intoxicating liquors, to-wit, five hundred cases of whiskey to and into the State of Arizona, which said State of Arizona was then and there a State, the laws of which prohibited the manufacture or sale therein of intoxicating liquor or liquors for beverage purposes;". Overt acts were then pleaded. It was urged that the statute did not make it an offense to transport intoxicating liquors in interstate commerce into a "dry" state for any and all purposes, but excepted from its operation shipments of such liquor intended for scientific, sacramental, medicinal and mechanical purposes, and that the law of Arizona did not forbid the use of such liquors for such excepted purposes; that therefore, in order to make out a conspiracy to commit an act constituting an offense against the United States the indictment should allege that the intent was to ship the liquors in question for some purpose

not within the exceptions. In holding this argument bad the Court said in part:

> "In answer to this objection it is to be observed that we are dealing with an indictment charging a conspiracy to commit the offense, and not with a charge of the substantive offense denounced in the statute. If, therefore, the designation of the offense alleged to be the object of the conspiracy would be sufficient as a charge of the substantive offense, no reason is suggested, nor is any perceived, why a different or more specific statement should be required in describing it as the object of the conspiracy. In other words, if in an indictment charging a direct violation of the Reed Amendment it would not be required to negative the exceptions contained in the act, then clearly no such allegation is required here.
>
> "(3) That the description of the offense in this indictment alleged as the object of the conspiracy would be sufficient in charging the substantive act is fully sustained by this court in Shelp v. United States, 81 Fed. 694, 696, 26 C. C. A. 570, and cases therein cited. That was an indictment for violating a provision of the act providing a civil government of Alaska (23 Stat. 24), which forbids 'the importation, manufacture and sale of intoxicating liquors in said district, except for medicinal, mechanical and scientific purposes.' It was objected that the indictment was bad for failing to allege that the act charged was not within these exceptions, but the court held that the exceptions constituted no part of the definition of the offense; that they were purely matters of defense, and need not be negatived in the indictment, but could be proven at the trial, if relied upon as a defense. See, also, United States v. Simpson (D.

C.), 257 Fed. 689, where a like conclusion is reached as to the sufficiency of an indictment under the act here involved: the court holding that the exceptions found in the act afforded only ground for a defense.

"(4) It is said that without such allegation there is nothing in the indictment to show that the purpose of the conspiracy was unlawful. But it is alleged that the purpose of the defendants was to 'wrongfully, unlawfully, and feloniously trasport,' etc., such intoxicating liquors. This is sufficient to import an unlawful motive; the question of its truth being a matter of proof at the trial. * * *"

See, also:

Dahl v. United States, 234 Fed. 618 (C. C. A. 9th 1916).

The charging paragraph of the indictment sets forth the elements of the offense of conspiracy in that it alleges the appellants fraudulently engaged in a conspiracy to violate the Second War Powers Act by selling, trading, leasing, shipping and transferring new tires and tubes to consumers and other persons in violation of tire rationing regulations. An examination of the indictment as a whole discloses that any reader thereof would be apprised that appellants were charged with conspiring to sell and transfer tires in violation of tire rationing regulations. The entire language of the regulations referred to in the indictment was to show a prohibition against selling and transferring rubber tires and tubes, except under circumstances which would arise only upon the positive action of a rationing authority whereby exemption would be created in favor of certain persons to whom certificates evidencing that fact would be issued by the rationing authority.

The case of *Hagner v. U. S.*, 285 U.S. 427, 52 S.Ct. 417, 76 L.Ed. 861 (1932), has become a leading case upon the sufficiency of indictments.

> "The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case of any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what ex tent he may plead a former acquittal or conviction. Cochran and Sayre v. United States, 157 U. S. 286, 290; Rosen v. United States, 161 U. S. 29, 34.
>
> "Section 1025 Revised Statutes (U.S.C., Title 18, Sec. 556) provides:
>
> 'No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.'
>
> "This section was enacted to the end that, while the accused must be afforded full protection, the guilty shall not escape through mere imperfections of pleading."

The *Hagner case* has become a landmark in the law of criminal pleading and has been cited with approval extensively. See *Hopper v. United States*, 142 F.(2d) 181 (C.C.A. 9th 1943):

> "At least since Hagner v. United States, 285 U.S. 427, 52 S.Ct. 417, 76 L.Ed. 861, the federal court has determined the sufficiency of criminal pleadings on the basis of practical as opposed to technical considerations."

The modern rule by which the sufficiency of an indictment is to be tested is also succinctly stated in *Martin v. United States*, 299 Fed. 287 (C.C.A. 4th 1924):

> "(2) In an indictment, the mere multiplication of words never does any good, and often leads to a miscarriage of justice. The sufficiency of a criminal pleading should be determined by practical, as distinguished from purely technical, considerations. Does it, under all the circumstances of the case, tell the defendant all that he needs to know for his defense, and does it so specify that with which he is charged that he will be in no danger of being a second time put in jeopardy? If so, it should be held good. Section 1025, Revised Statutes (Comp. St., Sec. 1691). If it does not and its deficiencies cannot be adequately supplied by a bill of particulars, it should be stricken down."

The selling and transferring of tires under the exceptions permitted by the regulations could not meet the language of the indictment for such sales would not be (a) in violation of the statute, executive orders, regulations and directives, or (b) unlawful, or (c) corrupt, or (d) fraudulent. The second test prescribed in the decision of *Martin v. United States* is whether the indictment pleads the charge sufficiently to protect the defendant from double jeopardy. Appellants contend that the charge is pleaded too broadly, which is not the case. It is plain, however,

that appellants have been placed in jeopardy under an indictment which charges a conspiracy to violate the statutes by violating the several tire regulations promulgated thereunder and the purpose of the conspiracy was sufficiently broad that it would be impossible to again plead an indictment for the same offense without running afoul of the identification pleaded in the indictment now before the court. Seven conspirators are named and the specific rationing regulations cited. The purpose of the conspiracy is mentioned, and ten overt acts are set forth with considerable detail.

The essence of the crime of conspiracy is the unlawful combination, and as the object of the conspiracy is the accomplishment of some unlawful act, the means by which the unlawful act is to be accomplished need not be set forth in the indictment.

> *Proffitt v. United States,* 264 Fed. 299 (C.C.A. 9th 1920).

It is unnecessary for the indictment to set forth the object of the conspiracy with the same particularity of detail as in cases of completed acts constituting a past offense and this ruling has been applied even where the offense which was the object of the conspiracy has been consummated. Conspiracy to commit a crime is a different offense from the crime which is the object of the conspiracy.

> *United States v. Rabinowich,* 238 U.S. 78, 35 S.Ct. 682, 59 L.Ed. 1211 (1915);
>
> *Williamson v. United States,* 207 U.S. 425, 285 S.Ct. 163 52 L.Ed. 278 (1908);
>
> *Wong Tai v. United States,* 273 U.S. 77, 47 S.Ct. 300, 71 L.Ed. 545 (1927).

II.

The Ruling of the Court in Denying the Appellants' Motions for a Bill of Particulars Was Within the Proper Exercise of Its Discretion.

The demand for bill of particulars filed by appellant Vitagliano [R. 87] demanded information as follows:

1. What particular provisions of the regulations referred to in the indictment did the defendants conspire to violate?

2. What statute defining offenses against the United States did the defendants conspire to violate?

3. In what way does conspiracy to violate any of the provisions of any of the regulations referred to in the indictment constitute an offense?

The demand for bill of particulars filed by appellant Rose is of similar substance [R. 84].

The office of a bill of particulars is to inform defendants of particular facts, not to draw out a brief from the government upon the legal theories of the prosecution. The indictment cited the regulations involved. The request for a citation to the statute was also out of keeping with the purposes of a bill of particulars.

Application for a bill of particulars is addressed to the sound discretion of the Court and there being no abuse of this discretion the action of the trial court in denying a bill will not be disturbed.

> *Wong Tai v. United States*, 273 U.S. 77, 47, S.Ct. 300, 52 L.Ed. 278 (1927).

III.

The District Court Did Not Err in Denying the Defendants' Motion to Dismiss the Government's Case at the Close of the Opening Statement.

The single authority cited by appellants in support of their argument on this subject does not appear to treat the subject of opening statements at all.

> *United States v. Weissman,* 266 U.S. 377, 69 L.Ed. 334.

In the closing portion of the opening statement Government counsel said [R. 113]:

> "I haven't by any means given you all of the details that will be revealed to you."

Counsel apparently was following the practice favored in such decisions as *Stuthman v. United States,* 67 F.(2d) 521 (C.C.A. 8th 1933), where the following language appears:

> "The opening statement of counsel is intended to advise the jury concerning the facts involved so as to prepare their minds for a better understanding of the evidence to be heard. Its purpose is to give the jury an idea of the nature of the action and defense. How elaborate it shall be made is largely left to the discretion of the attorney, but to relate the testimony at length would not be good practice nor ordinarily tolerated. It is only when the opening statement of counsel clearly affirmatively shows that plaintiff cannot recover that the court will grant judgment or direct a verdict thereon."

After the motion was made, the Court stated [R. 116]:

> "I noticed in the opening statement that the Government only stated a few facts; and I am going to give the Government an opportunity if they desire, to make a further opening statement and whether or not they expect to prove all the allegations of the indictment"

After some discussion [R. 116-124] Government counsel, with the Court's permission, added to his opening statement [R. 124-126] including in his further remarks the following [R. 124]:

> "We intend to prove, gentlemen, each and every part of this indictment, * * *"

Further authority for the appropriateness of the Court's ruling is found in these cases:

Best v. District of Columbia, 291 U.S. 411, 54 S.Ct. 487, 78 L.Ed. 882 (1934);

McGovern v. Hitt, 64 F.(2d) 156 (App. D.C. 1933);

Lucas v. Hamilton Realty Co., 105 F.(2d) 800 (App. D.C. 1939).

IV.

The Evidence Was Sufficient to Justify the Verdict.

The conviction rests largely upon circumstantial evidence and appellants challenge it upon that ground. In this connection reference is made to *Smith v. United States,* 157 Fed. 721 (C. C. A. 8th 1907), in which case the Court said:

> "True, there is no direct evidence of the conspiracy. If that were necessary, it rarely, if ever, could be proved. Conspirators do not work in the light. They prefer darkness literally and figuratively. They frequently obscure their purpose by formal and technically correct instruments of writing, leaving their real purpose for execution, notwithstanding the writing. The effects and results of a conspiracy can be observed and proved, but rarely can one get a glimpse or make proof of the secret conferences which inaugurate it. For these manifest reasons proof of a criminal combination to do an unlawful act can rarely be made except by light reflected from its consequences or results.
>
> "We had occasion recently in the cases of Thomas and Taggart v. United States (just decided(156 Fed. 897, to consider the question now before us. We there said:
>
> " 'A preconcerted plan to do an unlawful act must from the nature of the case be usually established by inferences drawn from the relation of the parties from the acts done and from the results achieved.' "

Appellant's contention that the overt acts pleaded in the Indictment are not in themselves criminal is not meritorious.

There must be an overt act but it need not be of itself a criminal act.

Duplex Press Co. v. Deering, 254 U.S. 443, 41 S. Ct. 172 (1921);

United States v. Rabinowich, 238 U.S. 78, 35 S. Ct. 682, 59 L.Ed. 1211 (1915);

Marino v. United States, 91 F.(2d) 691 (C.C.A. 9th 1937).

No formal agreement between the parties is essential to the formation of the conspiracy.

Fowler v. United States, 273 Fed. 15 (C.C.A. 9th 1921);

United States v. Hirsch, 100 U.S. 33, 25 L.Ed. 539 (1879);

Shook v. United States, 10 F.(2d) 151 (C.C.A. 5th 1926).

The testimony established the facts to be as follows:

Appellants collaborated to acquire and conceal a stock of new tires and tubes during the early days of rationing and continuing throughout the life of the conspiracy.

On or about May 22, 1942, defendant Taplin bought out the stock of new tires and tubes of a dealer named Novisoff who did business as Perfect-Made Tire Company and who was retiring from the tire business. He paid $4,800 therefor. Defendant Weinstein took delivery of said stock of tires and tubes the following Sunday [R. 129].

On May 25, 1943 defendant Taplin purchased fourteen additional tires from Novisoff. At that time Novisoff said to him, "How the dickens can you sell tires? We have only sold a few tires. I don't understand how you

can dispose of them. You cannot sell them, because of rationing. We have only sold a very few." Defendant Taplin told him that Weinstein was connected with a lot of physicians and surgeons who were entitled to new tires [R. 131].

The said tires were observed on May 26, 1942, by a Los Angeles City Police Officer packed in trucks at a gasoline service station in the vicinity of 12th and Stanford Street [R. 134-137].

Appellant Vitagliano was present and said that along with five other people he owned the tires. He named appellant Rose and defendant Taplin as among his co-owners.

The preceding day William Fitzer, an OPA investigator, had observed the same tires at the same place and had also talked with appellant Vitagliano at that place about the tires. There were approximately 318 tires and 900 tubes at that time. Defendant Taplin was also present. Appellant Vitagliano produced the invoices showing that the tires and tubes had been billed to Taplin. Vitagliano told Fitzer that Taplin owned the tires, whereon Taplin said that he had bought them as an investment and planned on buying wherever he could under the impression that prices would rise as tires became scarce. Taplin also said that it was intended to store the tires in Bekins Warehouse near 4th and Alameda, and reiterated that he had complete ownership of the tires [R. 140-142].

The investigator later observed the same trucks containing the tires parked across the street from the Bekins Warehouse which Taplin had mentioned and observed Taplin and Vitagliano go into the Bekins Warehouse and

come out and leave the scene. Later the trucks were driven to a garage at 9th and Crocker Street [R. 143].

A day or two later the witness was present at an interview with Taplin at the OPA local office at which Taplin stated that the tires were owned by Vitagliano, Weinstein and himself, each owning a one-third intrest. Reminded that this was a different statement than he had given before he specifically repudiated his earlier claim of sole ownership [R. 144].

The tires were next observed being unloaded by Taplin and Vitagliano and defendant Weinstein at a building connected with a gasoline service station on City Terrace [R. 145].

When appellant Vitagliano went into the Bekins Warehouse office as aforesaid he asked the attendant there if tires could be stored and taken out without certificates, the attendant said, "No, sir; they couldn't be." Whereon Vitagliano left and thereafter took the tires to the building connected with the service station [R. 148-149].

Defendant Weinstein had been present when the trucks used in the transportation of the tires were rented [R. 150].

Exhibit No. 8 is an inventory of the tires taken by an OPA investigator and bearing defendant Taplin's signature [R. 152-153].

In September, approximately four months later, defendant Taplin told another OPA investigator, Mr. Foster, that he had sold the tires to defendant Brown and showed an invoice, Exhibit No. 9 [R. 154].

The previous day the investigator attempted to contact Taplin and found defendant Weinstein at his place of

business. The tires had all been removed from the City Terrace location [R. 155].

To the same effect is the testimony of OPA investigator Earnest [R. 161].

September 29, 1942 a van loaded with tires was taken into the Arlington Van and Storage warehouse and the tires put in the set-off space where they remained for four days and were then removed by two men, one of them believed by the manager to be appellant Rose. The tires were taken out late at night [R. 157].

At the conference in the OPA office at which defendant Taplin changed his story that the tires were owned entirely by himself to the statement that appellant Vitagliano and defendant Weinstein were equal partners with him, said defendant Taplin was called upon by another OPA investigator, Mr. Dundas to explain a shortage in the tires which was apparent from the comparison of the invoices, Exhibits No. 3 and 4, and the inventory, Exhibit No. 8. Defendant Taplin stated he didn't know how the shortage had occurred [R. 164-166]. Said defendant admitted originally having received the tires invoiced.

In July, 1942, appellant Rose rented a store room at 613 North Virgil in Los Angeles, stating to an employee of a bank who rented it to him that he wanted to store some furniture and equipment, and that his business was the purchase and sale of equipment. He occupied the premises during the months of August, September and October, 1942 [R. 167].

In September, 1942, appellant Rose rented storage space at 5901 Sunset Boulevard, Los Angeles, from Mr. Randall [R. 169]. Police Officer Hamilton of the Los Angeles

Police Department observed a pile of paper and boxes from which tubes had been taken scattered about the premises at 613 North Virgil on September 19, 1942, six weeks after Rose took possession [R. 254], and identified Exhibits No. 21 and 21-A as a fair and reasonable representation of the appearance of that place at that time. Before the picture was taken the officer had removed nine unwrapped tires from the premises [R. 254-255]. Immediately prior thereto apellant Rose had been observed in the immediate vicinity of the building by another city police officer, Fred H. Doane, and had tried to escape and in so doing made a left-hand turn with such haste as to scrape his car against the side of the building [R. 242-244]. Appellant Rose at first denied to officer Hamilton that he had keys to the building and stated that he didn't have anything in the building. Nine tires in addition to those shown by the photo, Exhibits No. 21 and 21-A were taken from the building after keys had been found upon the person of appellant Rose [R. 247-255]. One of the tires was labeled "Perfect-Made Tire Company" which was the name under which Novisoff, who had sold the original consignment to Taplin did business [R. 130; Ex. 2].

Defendants acquired tires on other occasions. Sam Parsner sold 38 tires to defendant Brown on September 9, 1942, at Los Angeles. Appellant Vitagliano was present and helped load the tires. These tires are enumerated on Exhibit No. 22 [R. 224-225]. The truck used to pick up the tires had been loaned to appellant Vitagliano on September 9, 1942, by Mr. Graham, manager of a provisions company. Vitagliano told Graham he wanted to borrow a truck to haul some oil [R. 233-234]. The

license number of the truck, as given by its owner, had also been jotted down on the back of the invoice, Exhibit No. 22, by Mrs. Parsner who made out the invoice [R. 227-234].

OPA investigator Foster talked to defendant Brown about Parsner's invoice. This took place at Brown's place of business known as Rappan Service. Brown was asked if he had purchased Parsner's tires. He replied that he didn't want to say whether he had or not. After some questioning Foster told Brown he had seen the bill. Brown replied, "Well it doesn't have my signature on it." Finally Brown admitted he had bought the tires but stated he had sold them but didn't remember the name of the buyer. He said he would produce the invoice but did not have it at the time and suggested that the investigator return the next day to see the invoice [R. 228]. The following day defendant Brown showed Foster an invoice and gave him a copy, Exhibit No. 23. Exhibit No. 23, the invoice given OPA investigator Foster by Brown for the purpose of demonstrating that he had made a lawful sale of the tires to a dealer purports to show that the same was to T & M Tire Service and that the sales tax number of that purchaser was AA17452 and that one Jack Briffit received the tires for the proprietor of T & M Tire Service. Mr. Montgomery testified that he had been proprietor of the T & M Tire Service until March, 1942 and had used a truck in the business but that he had been out of the business since that time. He did not know defendant Brown and did not buy any tires from him. His sales tax number was not AA 17452 but was AA 89008. He did not have an employee named Jack Briffit and did not buy any tires of the description shown on Exhibit

No. 23 after he went out of business in March. (The purported sales were made many months thereafter.) Montgomery did not deal in new tires except on consignment, his business was used tires [R. 230-231]. The sales tax number shown on Exhibit No. 23 was the *bona fide* number of Henry Immerman, a piano dealer in Los Angeles, who never had any dealings in tires [R. 233].

In fabricating the story of a sale of the Parsner tires and making out a false invoice, defendant Brown was aided by his recollection of a firm style he had seen on a truck at his station as disclosed by the record at pages 240-241. It there appears that Sam Rappan was once the owner of the Rappan Service Station, that thereafter defendant Brown operated that station, that Rappan reacquired the station during December, 1942, and that between October 15, 1941 and December 16, 1942, Rappan had a truck that had "T & M Tire Service" printed upon it. It was a truck he had purchased from a fruitman [R. 240-241].

Another instance of issuance of a false invoice to seemingly account legitimately for the disposition of tires and tubes is disclosed in the testimony of Norman Irwin, auditor for the Eagle Oil Company [R. 260-264], Exhibit No. 28.

Sam Kelber, a tire dealer in Ontario, California, met defendant Weinstein and appellant Vitagliano in Los Angeles and told them that he had decided to liquidate his tire business. Weinstein told him he thought he could find him a customer and thereafter took appellant Rose to Kelber's place of business. On August 1, 1942, Weinstein, Rose and others went to Kelber's home in Ontario. Appellant Vitagliano was also present in the living room

of Kelber's home when the tires were tallied. The tires involved were inventoried on Exhibit No. 14 and were purchased by appellant Rose for $4,575 [R. 175-179].

The tires were transported from Ontario in two closed vans by C. A. Humbert who was doing business as Bay Cities Express and Transfer Company. The tires were all wrapped, the tubes were in boxes. The windows of the room at 613 North Virgil, where the tires were taken, were all boarded up.

Appellant Rose told Humbert, the owner of the vans, that if he needed any tires Rose would go down to the OPA for him and save him a lot of red-tape [R. 194].

During August, 1942, defendant Weinstein met Reuben Slavett who was in the tire business under the style Dandy Tire Co. at 1850 East Colorado Street, Pasadena. Weinstein told Slavett he could find a buyer for Slavett's tires and took him to see appellant Rose. Slavett sold Rose a quantity of tires for $2,900. These tires are listed on Exhibit No. 20. The next day Rose, in company with drivers from the same trucking concern that had carted the previous purchase of tires from Ontario, called at Slavett's place of business in Pasadena. Appellant Vitagliano and defendant Weinstein were also present. There were 212 new tires and 798 new tubes involved in this transaction. They constituted substantially all the stock of tires Slavett had. On August 22, which was the date said transaction was consummated the aforesaid Humbert again took his van and carted the tires to 613 North Virgil. This was at the request of appellant Rose. After this transaction had been completed, appellant Rose told Slavett that if he knew anybody else who had new

tires to sell to get in touch with him and he would compensate Slavett [R. 208-216].

Twenty days had intervened between this transaction and the purchase of tires from Kelber at Ontario.

The moving man Humbert testified that after he brought in the tires from Ontario the room at 613 North Virgil was better than three-quarters full of tires, but that when he took the tires there from the Slavett purchase at Pasadena twenty days later very few tires were left [R. 194-195].

Around the floor of the room on the day of the second delivery of tires by Humbert there was quite a pile of tire wrappings. At the request of appellant Rose the entry on Humbert's invoice was "Auto Accessories" instead of "tires" [R. 196]. The same moving man moved the original stock of tires purchased by Taplin from Novisoff from the City Terrace address to the Sunset Boulevard storeroom which appellant Rose had rented from Mr. Randall [R. 196-199].

This delivery commenced at 5:30 in the evening [R. 197] and continued until 8:00 p. m. [R. 199].

The cargo was referred to on the invoice, Exhibit No. 18, at appellant Rose's request as "Auto Accessories" instead of "tires". Some of the tires were sent to another address in another truck belonging to Humber [R. 198]. At the time of the transfer of the tires of the Ontario purchase to 613 North Virgil, Rose used the name of "Sam Blank" in his dealings with Mr. Parmalee, Humbert's truck driver [R. 236]. The trucks used by Humbert were closed vans [R. 197]. The rear of the trucks were covered with tarpaulin, the tires inside were com-

pletely covered up. On the first occasion they were hidden under furniture pads on orders from appellant Rose. The delivery to the premises rented from Mr. Randall was timed so that it was getting dark when the trucks arrived [R. 203].

Thereafter appellant Rose asked Humbert, the owner of the trucking service, whether the OPA had called up. He wanted to know if the OPA had asked where the tires went to. Finally the invoice showing the trucking transaction was falsified so that it did not show the destination of the tires. It was made out that way at appellant Rose's request, Exhibit No. 18 [R. 199-200].

On July 21, 1942, Mike Kreling, a service station operator, sold appellant Rose 48 new tires and 128 or 130 new tubes. After the price had been quoted Rose and before he accepted the offer, he stated that he desired to take up the matter with his partner. When the sale was consummated Kreling thereby liquidated his stock of tires and gave Rose an invoice, Exhibit No. 10 [R .158].

Defendants Weinstein and Taplin attempted to purchase tires from one Steinberg a couple of months after the freezing of tires but Steinberg declined to sell [R. 264].

Appellant Rose called on one Paddock, a tire jobber at a time estimated as May, 1942, and examined 60 or 70 tires, all new in wrappers. Paddock referred him to the owner of the tires but no sale was consummated [R. 265].

In May, 1942, defendant Weinstein and appellant Vitagliano purchased a quantity of tires from one Davis. In checking the tires Davis missed the invoice and found

that either Weinstein or Vitagliano had it in his pocket [R. 272-274].

On October 1, 1942, appellant Rose went to the Hertz truck service in Los Angeles and rented a closed-in body truck. When it was returned it had four tires in it. One of the tires bore a pasted slip on which the words "Perfect-Made Tire Co.", 1161 South Main Street, Los Angeles" were written. This was the trade style under which Novisoff did business. Novisoff is the man who first sold tires to defendant Taplin in May, 1942 [R. 171-172].

On October 13, 1942, Mr. Foster, an OPA investigator, saw appellant Rose go into a driveway on Sunset Boulevard. He waited for some time and then walked in, leaving his car outside. There was an Oldsmobile on the premises with quite a large trunk over its rear. The trunk was open. The rear had been filled with tires and some tubes. Rose was covering them over with a blanket when he observed Foster. He said, "Can't I do anything without you being on my trail?" The door was open to a warehouse at the premises and with Rose's consent Foster looked in and counted eight large tires and approximately 100 new tubes. In the center of the room were numerous wrappings of tires and a large number of empty tube boxes. Foster made the statement that Rose had gotten rid of quite a few tires out of there recently. Rose inquired how he knew it. Foster replied he knew how many had been in there [R. 302-303].

Sometime subsequent to March, 1942, Leo Isenhower, a laundry man, went to a small office at a service station

in Los Angeles. Appellant Rose was in the office and the subject of inner tubes was mentioned. Isenhower talked to Rose about it.

> "The sum and substance of the conversation was that he had some inner tubes for sale. I needed them. He said he could sell them to me, and I said I would like to get them, so I made an agreement to buy them from him. * * * I met him on a different day, a day or two later, it was convenient to him and convenient to me, and I got them at another place. It was near 9th and LaBrea, on a vacant lot, next to a large building. * * * He brought along the inner tubes I had agreed to buy from him, and I bought them from him. It seems to me there was five or six; I think there were six boxes of them. I think there were six in a box. That would be 36 inner tubes. I paid him. I can't recall exactly what price that I paid him was, but it was close to what we had originally agreed on. * * * I was not a retail tire dealer at that time. I am a laundry man. I did not have any certificates from any rationing board to obtain these tubes" [R. 276-279].

Appellants attempt to make a point that there is no testimony that the tubes were new. However, from the foregoing it is to be noted that the tubes were boxed six in a box, and the following quotation indicates that the parties contemplated new tubes. Considering the testimony together with the circumstances that appellant Rose was observed packing new tubes in quantity into his car from a stock of new tubes, it was reasonable for the jury to infer that the sale to Isenhower was of new tubes.

> "I was getting the tubes for both trucks; and it was my impression that inner tubes, new inner tubes,

were frozen and the only place that a private party could buy them would be to find somebody that had them that he could get them from. I learned different since them, but that was my impression at the time. I felt that I was perfectly O.K. to go ahead and buy the tubes from him, so I never talked about it. I didn't think I was violating any law" [R. 279].

Appellant tried this part of the case on the theory that the particular tubes were new. He tried to show that the witness Isenhower had been granted immunity in consideration of his testimony. Although this effort was fruitless to him it tended to establish that it was recognized in the trial of the case that the matters testified to by Isenhower concerned a sale of new tubes in a manner that constituted a violation of the regulations [R. 282].

Appellant Rose went to the service manager of a used car concern in September, 1942, and offered to sell new tires at a price of $35.00 a piece in lots of 100 or more, or $37.50 a piece in lots of 4. These prices were clearly disproportionate to the representative price for new tires [R. 256].

On June 24, 1942, Willis S. Storms, an investigator for the OPA, went to a parking lot in Los Angeles which was operated by appellant Rose. He had a conversation with Rose as follows:

"I had a conversation with him. No one else was present there in hearing of the conversation. It took place in the little office building on the lot, gas station office.

"I said, 'Ben?' He said, 'Yes.' 'I want to see you for a minute.' He says, 'What about?' I said, 'Tires.' He says, 'What kind of tires?' I said,

'New tires.' 'Who sent you?' I said, 'The old gentlemen down on the parking lot on Sixth Street.' 'Why didn't he fix you up?' Mr. Rose continued. 'He told me that I would have to see you; that you were the owner.' Rose then said, 'How many tires do you want and what size?' I said, 'Well, it depends on the price.' And then he said, before I continue further, he said, 'Have you got any identification?' And I said, 'What for?' He said, 'I can't afford to take any chances, you know.' I said, 'Well, I have got the money to buy the tires and that is all I want to discuss with you.' He said, 'Well, I should know something about you. Have you got a business card or something' I said, 'No.' I said, 'You are not going to get me in any trouble and I am not going to tell you who I am. In fact, it is none of your business.' He looked me over pretty carefully. And he said, 'Well, what size?' And I said, '6.50 x 16s.' Rose said, 'Well, I can give you four beautiful new tires, Goodyear or Miller, for $175.'

"I said, 'I could not probably afford that much.' I asked him how much new retreads would be. He says, 'I will give you four dandies for $25 apiece.' I said, 'Well, I haven't got the money with me, but when can I get the tires?' He said, 'Well, what do you want to do? Do you want new tires or retreads?' I said, 'I don't know.'

"So he handed me a parking ticket with a telephone number on it [Ex. 32], and said, 'Call me up at this telephone number tomorrow morning and tell me what you want and I will tell you where to meet me. * * * [R. 345-346.]

"I left the premises at 955 South Hill Street. I returned to those premises again the following morn-

ing at 11:00 o'clock, I saw Ben Rose at the same location, 995 South Hill Street. I had another conversation with him. * * * arrived at this parking lot at 11:00 o'clock and was greeted by this young man representing himself as David Rose. Ben Rose arrived a very few minutes after I arrived on the parking lot. Ben Rose immediately started to question me again as to my identity.

"He said, 'I have got to know something about you.' And I said to Rose, 'I thought we had discussed that yesterday.' He said, 'Well, who are you?' And I said, 'it is none of your business.' And I repeated, 'You are not going to get me into any trouble and I haven't got any papers.' He said, 'I am not worried about that and I can't afford to take any chances.' I said, 'Well, what about the tires? Where are they?' He said, 'Well, we have to go over here a few blocks.' He said, 'What did you decide on?' I said, 'Two new 6.50 x 16 tires and two new retreaded tires.'

"Ben Rose and his brother and I started to walk off the lot, when the defendant said, 'Well, let's get in your car,' meaning my car. I started the car and had driven approximately 25 or 30 feet when the defendant asked me to stop, and both he and his brother got out of the car and walked over a short distance, I would say 20 feet or 30 feet, to the parking lot attendant. He came back and said, 'I guess we can't do no business, Mr.' I just brandished my hand casually, got in my car and drove off the lot." [R. 346-348.]

Following the above mentioned transaction, Mr. Hoffman of OPA had, in June, 1942, a conversation with Mr. Storms and appellant Rose at the office of the OPA as follows:

> "* * * I proceeded, first, to talk to Mr. Storms and Mr. Foster, in the presence of Mr. Rose, and at that time Mr. Foster and Mr. Rose—Mr. Storms informed me that Mr. Storms had been down to Mr. Rose's service station located, I believe, on the corner of Olympic and Hill, and had had a conversation with Mr. Rose in which Mr. Rose had offered to sell Mr. Storms four new tires for, I believe, a price of $175.00, and had offered also to sell Mr. Storms some retreaded tires for, I believe, $16.00 or $17.00 each.
>
> "I then asked Mr. Rose if he was the owner and operator of this service station; and he said, 'I refuse to answer.' I said, 'You have heard Mr. Storms recite what he just told me. Did that take place.' He said, 'I refuse to answer.' I asked him if he knew—if he operated a parking lot known as the Capital Parking Lot, or Capital Auto Parks, to which he replied, 'There are many Capital Auto Parks.'
>
> "Well, he said, 'I am speaking of the Capital Auto Park mentioned by Mr. Storms, located on 6th Street, I believe.' He said, 'I refuse to answer.' I asked him if he sold tires at his service station at the corner of Olympic and Hill; and he said, 'All service stations sell tires.' I asked him if he sold new tires. He said, 'I refuse to answer.' I asked him if he sold used tires. He said, 'Yes, we sell used tires.' * * * I said, 'Now, did you offer to sell Inspector Storms some new tires for $175, as he states?' He said, 'I never saw Inspector Storms before in my life.' I said, 'You mean you did not

see him before you came right here in this room?' He says, 'I have never seen him before in my life.' I said, 'You know Inspector Foster, this gentleman here?' He said, 'I never saw Inspector Foster before in my life.' * * * Mr. Storms again went through and repeated that he had gone into this parking lot, after being at the Capital Auto Parks first, and there being interviewed by an attendant, then from there he had gone over to the station at Olympic and Hill and had met Mr. Rose, and that Mr. Rose at that time had offered to sell him the four new tires for $175 and the retreaded tires for about $16 each.

"I said, 'Did he ask you or did you offer to state that you had any rationing certificate?' Mr. Storms said, 'No.' I then said to Mr. Rose, again, 'Mr. Rose, did you offer to sell these new tires or retreaded tires to Mr. Storms?' He said, 'I never saw Mr. Storms before in my life.' * * * I asked him if he had sold tires in the past and he said he had. I asked him if he sold tires without rationing certificates and he said, 'You can't sell tires without rationing certificates.' I said, 'Did you sell tires without rationing certificates?' He said, 'I refuse to answer.'

"And generally, from that point on Mr. Rose stated that he would refuse to answer any further questions." [R. 285-287.]

On the same day Appellant Rose had a conversation with Mr. Foster who related it as follows:

"After this statement had been taken from Mr. Rose, Mr. Rose told me that he would like to speak to me alone. I followed him outside. No one else went with me. We went out in the highway, toward the front door of 1033 South Broadway, where we stood.

Mr. Rose asked me if I remembered seeing him any place, and I told him I didn't believe I did. (This conversation took place in June, 1942.) He said, 'I know you. I have seen you up at Louis Vitagliano's, on his lot.' I said, 'What were you doing up there?' He said, 'What do you think?' I asked Ben at that time to tell me, I said, 'Why don't you come across and tell me what you know about this deal? It is going to make it a lot easier if you tell us all you know about these things, and let us get it over with.' He said, 'I don't think I can, as long as there is anyone writing down what I say.' He asked me if I knew Les Carston, and I said I did not. He asked me if I knew Sam Weinstein, and I said I did. He said, 'I know all of these boys too.' * * * I next met him two or three weeks after that date at his service station at 955 South Hill Street. I had a conversation with him. * * * I went in to talk to Ben regarding another tire movement. I asked him if he knew anything about it, and he said he possibly did, but he didn't care to discuss it. So he said, 'Jack', he said, 'You are on the wrong side of this thing. Why don't you get wise to yourself, and get in on the right side? There is some money to be made.' So I told him I wasn't interested. He said, 'Well, I know where there can be a few thousand dollars picked up if you just lay off. I know one thousand you would get right away, and I know several others that you can get, and I would be glad to take care of it for you.' I told him I wasn't interested in that at all; that I had a job to do, and I was trying to do it. About that time some fellow went by whom he knew—who Ben knew was in the tire business, those we had some trouble with, and he asked me if I saw Shorty go by, and I said yes. He said, 'You had better get out of here.' I said, 'Why?'

He said, 'Those fellows don't like to see you in here. They are liable to come back. I have gotten in trouble with them already, because they have seen me with you. If they see you in here a lot, they might think I am telling you a lot of things I shouldn't.' * * * the next time I saw Ben was when he came in to Mr. Dundas' office. * * * that was about the middle of July. * * * In the Office of Price Administration. There was a conversation then. Rose made—I don't recall his exact words, but he said he knew he was in trouble, and he had been thinking it over, and he was just wondering how he could get out. He said, 'I am willing to spend $500, or whatever it is, to get out of this, and get clean and straight again.' I don't recall who said it, whether Mr. Dundas or myself said it—we did not know how deep he was involved at that time, and we would like to have him tell us just how deep he was involved; what he had done. He said, 'Have you ever been threatened?' We said no we had not. He said, 'I have.' He said, 'Some of these boys I have been dealing with came around, and put a gun, laid a gun on the counter here, and said to me: 'You see this? You wouldn't want to be found lying around the road some place, would you?' They asked him, 'Do you know what that is?' He said, 'Yes, it's a gun.' And they said, 'You wouldn't want it used, or anything, would you?' He said no. They said, 'Just remember; you don't know anything when somebody comes around to ask you—' * * * he said he couldn't tell us any more. We told him, so far as we were concerned we did not know just how deep he was in the thing, and if he wouldn't tell us we would have to continue with our investigation. * * * I was walking north on Virgil, right in front of 611, which was an empty grocery store building, and I saw Mr. Rose pull up

to the lot right ahead of me. * * * Again he made the statement to me that he thought I was on the wrong side of this, and asked me if I was still fooling around with the OPA. I said I was. He said, 'Well, you are still on the wrong side. I think you are dealing with some pretty tough boys. You are liable to get hurt.'" [R. 293-299.]

Appellants argue that if none of the overt acts are relevant, material, or competent, that there cannot be sufficient evidence to warrant a conviction. Of course the law requires that some one overt act be done pursuant to the conspiracy in order that it be established that the matter was not idle talk, but an active conspiracy.

Appellee agrees that it is necessary that at least one overt act be proved and in order to be an overt act within the meaning of the conspiracy law, it is essential that the act be done in an effort to effect the object of the conspiracy. This is the holding in the three cases cited by appellant at page 25 of his brief.

The record abounds with testimony of overt acts. The conspiracy charged was one to "commit offenses against the United States, that is to say, to sell, trade, lease, ship and transfer new rubber tires, casings and tubes to consumers in violation", etc. [R. 78].

For what purpose did appellants at a time when the sales of tires were being restricted and strictly rationed go into the market and purchase the entire tire and tube stocks of several dealers. One of these dealers, Novisoff, said to defendant Taplin, "How the dickens can you sell tires? We have sold only a few tires" [R. 131].

The only inference to be drawn from the accumulation of the substantial stocks of several retiring tire dealers, and the rapid disposition thereof, unexplained by the pro-

duction of a single rationing certificate is that appellants acquired their large stocks of tires to effect their object of selling and transferring them without taking in certificates.

When during a period of strict governmental regulation of the tire trade, the appellants sought to conceal their activities, it can only be concluded that their activities could not stand the investigation that dealing in the open would invite. Overt Act C. [R. 78] shows an attempt by appellant Rose to conceal his acquisition of a stock of tires and their storage place, for he falsely led his landlord to believe that the premises were rented for conduct of a furniture and equipment business. Overt Act E. had like purpose.

Overt Act G., proved by Exhibit No. 28 and the testimony of Mr. Irwin [R. 260-264] shows an attempt to create a false record of sales of tires. To the same effect was the falsified record of a sale by defendant Brown of tires to the T & M Tire Service, a concern that was out of business at the time.

Appellant Vitagliano and defendant Taplin have attempted to mislead OPA investigators. Taplin told them that it was the purpose to store certain tires in Bekins warehouse. Thereafter they took the tires to the warehouse building and parked the trucks containing them out in front where they were observed by the OPA. This is no doubt what the defendant intended. However, the attendant in the warehouse testified that when he informed appellant Vitagliano that the tires could not be removed from the warehouse without certificates Vitagliano left without making any arrangement for the storing of the tires and the tires thereafter were taken in

charge by appellant Rose. It was from this stock of tires that appellant Rose loaded the trunk of his automobile at the time he was observed doing so by OPA investigator Foster.

In addition is the clear evidence of the sale of new tubes by appellant Rose to the witness Isenhower. It is clear that there must have been many other sales for the stock of tires kept in the Hollywood storage place which had been rented by appellant Rose diminished and large accumulations of tire wrappings and empty tube boxes were found lying on the floor of these places. There is nothing in the record to indicate that appellants ever received certificates from any one, although it would have been extremely simple had the stock of tires gone into legitimate trade to have offered such evidence at the trial. The only explanation ever given by any of the defendants as to disposition of the tires was the showing to OPA investigators of false invoices purporting to show that the tires had been sold to dealers. One of the dealers turned out to be a piano merchant who denied the transaction [R. 233]. All of the movements of appellants were cloaked in secrecy.

Appellant Vitagliano borrowed a truck from one Graham, telling Graham he wanted to haul oil in it, but he in fact used the truck to haul tires [R. 233-234].

Appellant Rose offered to arrange for tires to be issued to a transfer man saying that Rose would go to the OPA and save the transfer man a lot of red-tape [R. 194].

The moving man Humbert filled Rose's storage quarters at 613 North Virgil to three-quarters full of tires and twenty days later delivered another van full of tires to the address and found very few tires left [R. 164].

Appellant Rose asked him to enter the tires upon his records as auto accessories.

Appellant Rose made many statements to OPA investigator Foster which are inconsistent with the conduct of a legitimate tire dealer. Appellant Rose's transaction with OPA investigator Storms can only be explained as indicative of a plan to sell new tires without rationing certificates, a plan which was not completed as to the witness Storms because of a suspicion that Storms might be allied with law enforcement. The very price of tires quoted to Storms is palpably the price of a black market operator. The same is true of the offer by appellant Rose to sell tires to the sales manager for the Smiling Irishman. The compelling force of the evidence suggests the appropriateness of the court's language in its decision in *Henderson v. United States*, 143 F.(2d) 681 (C.C.A. 9 1944):

> "(2) The proof in a criminal case need not exclude all doubt. If that were the rule, crime would be punished only by the criminal's own conscience, and organized society would be without defense against the conscienceless criminal and against the weak, the cowardly and the lazy who would seek to live on their wits. The proof need go no further than reach that degree of probability where the general experience of men suggests that it has passed the mark of reasonable doubt.
>
> "And judges and juries do not begin the solution of the complex problems presented to them from a zero of knowledge. They start with the vast common knowledge and understanding possessed by the people. Applying such common knowledge and understanding to the evidence in this case, can there be the slightest doubt about the essentials of this case!"

V.

The Court Did Not Err in Refusing to Strike Evidence.

The motions to strike evidence were upon the ground that no *corpus delicti* had been proved.

There was also a motion to strike the testimony of the witness Foster upon the ground that it was hearsay. Apparently appellants' theory is that Foster testified to hearsay when he related conversations which he had with appellant Rose. Appellant Rose was not in a position to raise the objection, and as to appellant Vitagliano it is fundamental law that the statements made by a conspirator to effectuate and promote the objects of the conspiracy is binding upon all the conspirators.

> *Jung Quey v. United States*, 222 Fed. 766 (C.C.A. 9th 1915);
>
> *Williams v. United States*, 3 Fed.(2d) 933 (C.C.A. 6th 1925).

There can be no doubt from a review of the testimony that the statements made by Rose to Foster were made during the life of the conspiracy and not after it was terminated. The statements were made either for the purpose of deceiving Foster who was an investigator attempting to uncover the crime, or of dissuading Foster from continuing his investigation by threats, or of bribing him to cease his investigation, or to induce him to desert his trust and join the conspiracy. Necessarily such a purpose was in furtherance of the conspiracy. It is also noted that the statements were made long before the conspiracy ended.

VI.

The District Court Did Not Err in Denying Defendants' Motion for Arrest of Judgment.

A. The first ground urged by appellant is that the Indictment was defective. That subject has previously been dealt with in this brief and for that reason will not be repeated here.

B. The second ground is that Exhibit No. 26 and the tires enumerated thereon were inadmissible evidence by reason of an alleged illegal seizure of the tires. Although appellants' brief does not so state this point is apparently raised only as to appellant Rose, for appellant Rose was the only person to ever claim ownership of the tires [R. 249 and 252].

It is doubtful whether even Rose can raise the point for at the time the tires were seized even appellant Rose himself claimed that he had previously sold the tires and was not the tenant of the place where they were found and knew nothing about it [R. 299-300].

One who disclaims ownership of property seized can not complain of alleged illegality of the seizure.

> *Ingram v. United States,* 113 F.(2d) 966 (C.C.A. 9th 1940).

The point was not seasonably raised in the District Court.

None of the defendants at the trial and neither appellant objected to the testimony explanatory of the tires or the observations made by witnesses at the time the tires were taken into possession of Los Angeles City police officers. This testimony appearing between pages 242 and 249, inclusive of the record, seriously incriminated the appellants.

There was never at any time a motion to suppress any evidence. There was never at any time a motion made to compel the return of any evidence to anyone. The only attack ever made upon any of the evidence relating to said tires was embodied in a long objection made when the tires were offered in evidence, and after the foundation had been laid for their introduction by testimony about the search and observations made when they were taken into possession of police officers [R. 242-248].

> "Thereupon, Mr. Goodman, together with Mr. Sullivan, Mr. Norcop and Mr. Angelillo approached the bench. Mr. Goodman thereupon stated that he objected to the tires being rolled into the courtroom and exhibited to the jury, and that his objection was based upon the following grounds, to wit: that they were incompetent, irrelevant and immaterial, were illegally obtained and were being rolled before the jury's eyes for the purpose of creating prejudice and appealing to the passion and prejudice of the jury by virtue of the tremendous size of the tires and on the further ground that there was nothing unlawful in the possession of the tires by the defendant Rose, and that the tires were not connected up in any way with the other defendants, or with the commission of any overt act. (The tires that were rolled in and exhibited to the jury were very large, new truck tires.)
>
> Mr. Shippee: I don't think those ought to be exhibited unless they have a ceiling price on them.
>
> By the Witness: Those are the tires that I took over to the Wilshire Station and which I brought here to court myself. I have checked the numbers on those tires with the record of the numbers I made when I took Mr. Rose to the Station.
>
> (The tires were admitted in evidence.)
>
> The Court: For the record. Don't you have a list of them?

Mr. Norcop: Yes, we have a list.

By the Witness: That is a list of the tires there. There is one more tire than is listed. The smallest of them is a duplicate. It is this one here (indicating). The two I am pointing out now are the same type. They are eight tires listed but nine tires here.

(The document referred to was received in evidence and marked Government's Exhibit No. 26.)

Rose asked me for the tires about three or four weeks later."

Said objection did not refer to the offer of the list of tires [Ex. 26] into evidence but was a protest only at exhibition of the tires themselves.

The tires listed on Exhibit No. 26 came into the possession of the Los Angeles Police Department September 19, 1942; appellants were indicted January 27, 1943, the trial commenced on May 3, 1943. The only place in the record wherein appellants raise any objection to the use of the tires as evidence was in the above quoted objection made at the time they were offered and in the motion for arrest of judgment. Therefore, it seems inappropriate to burden this brief with a discussion of whether or not the tires were properly seized for the case appears to come within the rule recited by this court in *Peters v. United States*, 97 F.(2d) 500 (C.C.A. 9th 1938):

"(1) Nearly five months elapsed after the fire before trial of appellant. Notwithstanding knowledge of the seizure of the evidence and the taking of the photographs no motion was made to suppress the evidence. Oral evidence obtained from what we assume was an unreasonable search was first admitted without objection. Under such circumstances, the objection taken at the trial came too late. Segurola v. United States, 275 U.S. 106, 111, 48 S. Ct. 77, 79,

72 L. Ed. 186, and cases cited; Cogen v. United States, 278 U.S. 221, 223, 49 S. Ct. 118, 119, 73 L. Ed. 275; Rocchia v. United States, 9 Cir., 78 F. 2d 966, 970. By failing to present the matter in advance of the trial, appellant waived her constitutional rights. Cogen v. United States, *supra,* page 223, 49 S. Ct. page 119."

It is pointed out by Justice L. Hand in his opinion in *United States v. Salli et al.*, 115 F.(2d) 292 (C.C.A.2d 1940), that this is the rule of six circuits and in that opinion the Second Circuit became the seventh to adopt the rule. The opinion, which discusses the rule at length, includes the following comment:

"Moreover, while it was not indeed discussing a constitutional privilege, which perhaps may make a difference, in Nardone v. United States, 308 U.S. 338, 341, 342, 60 S. Ct. 266, 84 L. Ed. 307, the Supreme Court expressed a very positive opinion that delay may effect a surrender. There is every reason why it should do so when the facts are all available in season; nothing more unfair than to leave open a preliminary inquiry which will make the whole prosecution abortive, and thus to put the authorities and their witnesses to the trouble and expense of useless preparation. We hold therefore that the judge in the case at bar was within his powers in refusing to entertain the motions. (Incidentally Matwizkow alone could have availed himself of the objection anyway; he was the only one in possession of the barn, and his was the only constitutional privilege violated."

The rule is also followed and discussed at length in:

Rossini v. United States, 6 F.(2d) 350 (C.C.A. 8th 1925);

Harkline v. United States, 4 F.(2d) 526 (C.C.A. 8th 1925).

VII.

The Second War Powers Act Is Constitutional.

Appellants' brief accents portions of the Act not nearly as relevant as the following quotation which is given scant attention in said brief.

U.S.C., Title 50, Sec. 633, subsection 2(a)(2):

> "* * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

The essential outline of the history of the statutes, executive orders, regulations, orders and directives involved in this case is as follows:

On June 28, 1940, just after the fall of France, Congress passed the Vinson Act (54 Stat. 676; 41 U.S.C.A., note preceding Section 1) delegating to the President certain powers, and on May 31, 1941, after Germany had overrun the Balkans, this law was amended, thereafter becoming known variously as the "Priorities and Allocations Act" or the "First War Powers Act" (55 Stat. 236; 41 U.S.C.A., note preceding section 1). On January 7, 1941, the President established the Office of Production Management within the Office for Emergency Management, and defined its functions, powers and duties (E.O. 8629; 6 F.R. 191). Within the OPM the President, on April 11, 1941, created the Office of Price Administration and Civilian Supply (E.O. 8734; 6 F.R. 1917), which on August 28, 1941, became OPA (E.O. 8875; 6 F.R. 4483).

On January 24, 1942, the President transferred all the powers of the Office of Production Management to the Chairman of the War Production Board (E.O. 9040; 7 F.R. 527). On the same date, the Chairman of the War Production Board, with the written approval of the President, promulgated Directive No. 1 (7 F.R. 562), which granted to the OPA the authority to exercise the powers and duties conferred upon the President with reference to the rationing of materials, including rubber, rubber tires, rubber tubes, and other rubber products at retail levels.

The foregoing, in brief, describes the derivation of authority of the agencies involved. The pertinent orders issued by these agencies were as follows:

On December 10, 1941—two days after the United States declared war on Japan—the Office of Price Administration promulgated Supplementary Order No. M-15-b, known as the "freezing order" because it froze the Nation's stock of rubber for a temporary period. It was extended on December 19, 1941, to last until January 5, 1942 (Amendment No. 1 to M-15-B; 6 F.R. 6644). This order, in turn, was superseded on December 27, 1941, by Supplementary Order No. M-15-c (6 F.R. 6792), which established rubber tire and tube rationing regulations and authorized the OPA to enforce and carry out these regulations and to promulgate and enforce further regulations for that purpose. This order was specifically approved by the President on its face. On December 30, 1941, the Office of Price Administration issued tire rationing regulations prohibiting sales or other transfers of tires to consumers and others without certificates from local tire rationing boards (7 F.R. 72).

A system of preference ratings was created by Priorities Regulation No. 1 (August 27, 1941; 6 F.R. 4489)

and continued in Priorities Regulation No. 3 (January 12, 1942; 7 F.R. 250). On January 20, 1942, the Office of Production Management promulgated "Amendment No. 3 of Supplementary Order No. M-15-c to Restrict Transactions in New Rubber Tires, Casings and Tubes (7 F.R. 434), restricting the use of preference rating certificates.

On February 19, 1942, the Office of Price Administration promulgated "Revised Tire Rationing Regulations" (February 11, 1942; 7 F.R. 1027), as amended February 17, 1942; (7 F.R. 1089), which prohibited sales or other transfers of new rubber tires, casings and tubes to consumers and other persons without certificates from local tire rationing boards.

On March 27, 1942, after Manila, Hong Kong, and Singapore had fallen, Congress enacted the Second War Powers Act, which not only gave the President the power to allocate materials and facilities necessary in the interests of national defense, but went further and provided that any person who should violate any provision of the statute or any rule, regulation, or order thereunder, *whether theretofore or thereafter issued,* should be guilty of a crime punishable by fine or imprisonment. It was provided that the President could exercise any power, authority or discretion thus conferred on him through such department, agency, or officer of the Government, as he might direct, and in conformity with any rules or regulations which he might prescribe (56 Stat. 177; 50 U.S.C.A. App. Sec. 633.)

Without commenting upon the constitutionality of the Act, the Circuit Court of Appeals, Fourth Circuit, has affirmed a conviction brought for a violation thereof.

Minker v. United States, 134 F.(2d) 403 (C.C.A. 4th 1943).

The same attack upon the constitutionality of the Act involved in this case was elaborately treated in the opinion in *Henderson v. Bryan,* 46 F.Supp. 682 (Dist. Ct. So. Dist. Calif. 1942), wherein the Act was held constitutional.

The Circuit Court of Appeals of the Second Circuit has directly held the Act constitutional, in *United States v. Randall,* 140 F.(2d) 70, (C.C.A. 2d 1944):

> "We entertain no doubt that the standard which the statute sets up is amply sufficient to meet the claim of invalid delegation."

The trial court in the *Randall* case also wrote a detailed opinion reported in *United States v. Randall,* 50 F. Supp. 139.

O'Neal v. United States, 140 F.(2) 908 (C.C.A. 6th 1944), concerned a prosecution for violation of Title III, Section 2(a) of the Second War Powers Act, the same provisions of the Act involved in this case. The opinion reads in part:

> "* * * the Congress in the field of its duties may invoke the action of the executive branch in so far as the action invoked is not an assumption of its own constitutional field of action. J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406, 48 S. Ct. 348, 351, 72 L. Ed. 624. In this decision, which upheld legislation empowering the President to increase or decrease duties imposed by the Tariff Act of September 21, 1922, the court held that in determining what one branch of the Government may do in seeking assistance from another branch, 'the extent and character of that assistance, must be fixed according to common sense and the inherent necessities of the governmental co-ordination.'

"(6) Appellant urges that this established doctrine does not aid the validity of the statutes here attacked because, as he contends, no standards are established to which the President must conform in the exercise of the statutory powers. But Title III, Sections 2 (a)(1) and 2(a)(2) of the Second War Powers Act of 1942, although terse, imposes certain definite restrictions. The President is authorized to allocate, that is to ration, critical materials and facilities only when he is 'satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage.' While the President is not required in so many words to make findings, he is given sweeping powers of investigation in the enforcement and administration of the statute, Title III, Section 2 (a)(3), and in light of this provision we read the word 'satisfied' as being equivalent to and including the word 'finds.' The same word, 'satisfied,' was used in the statute which was upheld against a similar contention in Field v. Clark, 143 U.S. 649, 12 S. Ct. 495, 36 L. Ed. 294. When the President is satisfied that a shortage exists, it becomes his duty to ration or allocate. But it is not the President who declares that priorities shall exist and allocations of materials and facilities be made; it is the Congress. Moreover additional standards under which the President must act are declared in the Second War Powers Act. It is true that these standards are not detailed at great length, but they are substantial. They require that when the President is satisfied that the shortage exists, allocations must be made upon conditions and to the extent that the President shall deem necessary or appropriate (1) in the public interest, and (2) to promote the national defense. The President, for instance, is not authorized to exercise this power merely because he deems it necessary or appropriate

in the public interest. It must also in his opinion be necessary or appropriate in promotion of the national defense.

"(7-9) We do not consider the lack of further detailed standards as invalidating this legislation. The Congress, acting within its legislative powers, was entitled to consider the character of the emergency confronting the nation and the 'inherent necessities of the governmental co-ordination.' J. W. Hampton, Jr., & Co. v. United States, *supra*. Munitions of war essential to our defense called for all the basic materials, metals, wood stuffs, cellulose, textiles, and the broadening categories of complex chemical products. They could not be manufactured if the raw materials were not conserved, and the very existence of the nation depended upon such conservation. The observation of Chief Justice Taft in J. W. Hampton, Jr., & Co. v. United States, became critically apposite here. The problems of allocation were myriad, and if the Congress were to deal with all of them it could not exercise the power to allocate at all. While the rule against the delegation of legislative power is fixed and unalterable, not depending upon the existence of emergency, the Congress, which is authorized to empower the executive to act in accordance with due legislative standards, may exercise a discretion in the fixing of those standards. In the emergency of war, the standards must be flexible enough to permit speed and efficiency of action for the national defense. * * * That the desired result of speed and efficiency of action has been attained by the rationing of materials and facilities under the Second War Powers Act of 1942 is demonstrated by the trimphant record of the American war industry. Since the President cannot order the allocations except as he deems it

necessary or appropriate in the public interest and for the common defense, which are drastic limitations, we think that no illegal delegation of legislative power exists, and the Act is valid. This conclusion is squarely supported by Sunshine Coal Co. v. Adkins, 310 U.S. 381, 397, 60 S. Ct. 907, 84 L. Ed. 1263."

Also see:

Brown v. Bernstein, 49 F.Supp. 497 (Dist Ct. of Pa.—1943);

United States v. Hark, 49 F.Supp. 95 (Dist. Ct. of Mass.—1943);

Brown v. Wyatt Food Stores, 49 F.Supp. 538 (Dist. Ct. of Texas—1943).

Conclusion.

From the foregoing it is respectfully submitted by the government that the judgment of the trial court was not contrary to law and that the evidence produced at the trial of the cause was ample to support the conviction of appellants as charged in the Indictment.

Respectfully submitted,

CHARLES H. CARR,
United States Attorney;

JAMES M. CARTER,
Assistant United States Attorney;

ERNEST A. TOLIN,
Assistant United States Attorney,
Attorneys for Appellee.

APPENDIX A.

AN ACT To amend the Act approved June 28, 1940, entitled "An Act to expedite the national defense, and for other purposes," in order to extend the power to establish priorities and allocate material.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act approved June 28, 1940 (Public Numbered 671, Seventy-sixth Congress), as amended, is amended by inserting "(1)" after "Sec. 2. (a)" and by adding at the end of subsection (a) thereof the following:

"(2) Deliveries of material to which priority may be assigned pursuant to paragraph (1) shall include, in addition to deliveries of material under contracts or orders of the Army or Navy, deliveries of material under—

"(A) contracts or orders for the Government of any country whose defense the President deems vital to the defense of the United States under the terms of the Act of March 11, 1941, entitled 'An Act to promote the defense of the United States';

"(B) contracts or orders which the President shall deem necessary or appropriate to promote the defense of the United States; and

"(C) subcontracts or suborders which the President shall deem necessary or appropriate to the fulfillment of any contract or order as specified in this section.

Deliveries under any contract or order specified in this section may be assigned priority over deliveries under any other contract or order. Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material for defense or for private account or for export, the President may allocate such material in such manner and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense. The President shall be entitled to obtain such information from, require such reports by, and make such inspection of the premises of, any person, firm, or corporation as may be necessary or appropriate, in his discretion, to the enforcement or administration of the provisions of this section. No person, firm, or corporation shall be held liable for damages or penalties for any default under any contract or order which shall result directly or indirectly from his compliance with any rule, regulation, or order issued under this section. The President may exercise any power, authority, or discretion conferred on him by this section, through such department, agency, or officer of the Government as he may direct and in conformity with any rules and regulations which he may prescribe."

Approved, May 31, 1941.

Ch. 157—55 Stat.

APPENDIX B.

6 Fed. Reg. 6406—TITLE 32—NATIONAL DEFENSE

CHAPTER IX—OFFICE OF PRODUCTION MANAGEMENT

Subchapter B—Priorities Division Part 940—Rubber and Materials of which Rubber is a Component

Supplementary Order No. M-15-b To Restrict the Use of Rubber

Whereas the further importation of crude rubber is imperilled:

Now, therefore, it is hereby ordered, That:

Sec. 940.3 Supplementary Order No. M-15-b-(a) Definitions. For the purpose of this Order:

(1) "Rubber" means compounded liquid latex, and all forms and types of crude rubber and liquid latex in crude form, but does not include balata, gutta percha, gutta siak, gutta jelutong, pontianac, reclaimed rubber and scrap rubber.

(2) * * *

(3) "Person" means any individual, partnership, corporation or other form of business enterprise.

* * * * * * * * *

(c) *General restriction on sales and shipments.* Except to fill purchase orders assigned an A-3 or better Preference Rating, from the date of issuance of this Order until Monday, December 22, 1941, no new automobile, truck,

bus, or motorcycle, farm implement, or other type of casing or tube, shall be sold, leased, traded, delivered or transferred: *Provided,* That the foregoing prohibition shall not apply to tires which are sold as a part of new or used vehicles being sold and which are affixed to such vehicles at the time of their sale. And also, no person shall ship or permit to be removed from his plants, warehouses, or other places of storage, during any calendar month, beginning with the month of December 1941 quantities of any class or type of rubber goods other than tires at a rate in excess of the rates of shipment or removal of similar classes or types of rubber goods during the month of November 1941 to fill purchase orders not assigned a Preference Rating of A-10 or better, except for the purposes of filling purchase orders assigned a Preference Rating of A-10 or better.

* * *

(g) *Effective date.* This Order shall take effect upon the date of its issuance.

* * * * * * * * *

Issued this 10th day of December 1941.

J. S. KNOWLSON
Acting Director of Priorities.

Filed, December 12, 1941

APPENDIX C.

6 Fed. Reg. 6644 PART 940—RUBBER AND PRODUCTS AND MATERIALS OF WHICH RUBBER IS A COMPONENT

Amendment No. 1 to Supplementary Order No. M-15-b, To Restrict the use of Rubber.

Supplementary Order No. M-15-b is hereby amended to read as follows:

Whereas, the further importation of crude rubber is imperilled:

Now, therefore, it is hereby ordered, That:

* * * * * * * * *

(c) *General restriction on the sale of tires.* Except to fill purchase orders assigned an A-3 or better Preference Rating, from the date of issuance of this Order until January 5, 1942, no new automobile, truck, bus, motorcycle, farm implement, or other type of tire, tire casing or tire tube, other than bicycle tires, shall be sold, leased, traded, delivered or transferred by any person, provided that the foregoing prohibition shall not apply to tires which are sold as a part of new vehicles being sold and which are affixed to such vehicles at the time of their sale.

APPENDIX D.

6 Fed. Reg. 6792 RUBBER AND PRODUCTS AND MATERIALS OF WHICH RUBBER IS A COMPONENT

Supplementary Order No. M-15-c To Restrict Transactions in New Rubber Tires, Casings and Tubes.

Whereas the further importation of crude rubber is imperilled, and

Whereas by Executive Order No. 8629 of January 7, 1941, and Executive Order No. 8875 of August 28, 1941 the Office of Production Management has been created and charged with certain authority and duties with regard to defense and civilian supply, priorities and allocations, and

Whereas by Executive Order 8734 of April 11, 1941 the Office of Price Administration has been created and charged with certain authority and duties with regard to consumer protection, price control, and the prevention of price spiraling,

Now, therefore, by virtue of the authority vested in the Office of Production Management by the aforementioned Executive Orders 8629 and 8875, and in order better to enable the Office of Price Administration to perform the duties with which it is charged under the aforementioned Executive Order 8734,

It is hereby ordered, That:

Sec. 940.4 Supplementary Order M-15-c(a) Delegation of authority to Office of Price Administration. In addition to the powers expressly vested in the Office of Price Administration elsewhere in this Order, the Office of Price Administration is hereby authorized to exercise,

in the administration of this Order, the powers of the Office of Production Management with respect to:

(1) The granting of exceptions and exemptions,

(2) The interpretation of this Order,

(3) The prescribing of forms for reports,

(4) The prescribing of requirements with respect to the keeping of records,

(5) The making of audits, inspections and investigations, and

(6) The amendment of this Order in the following respects:

* * * * * * * *

Power to revoke this Order and to make amendments other than those hereby authorized is reserved in the Office of Production Management. Subject to the terms of this Order, the Office of Price Administration may exercise the authority and duties hereby delegated to it, through such departments, agencies, officers or employees of the United States or any State as it is or may be hereafter authorized to utilize, and in conformity with Rationing Regulation No. 1 and such other amendatory or supplementary rules and regulations as it may prescribe.

(b) *Definitions.* For the purposes of this Order:

(1) "Person" means any individual, partnership, corporation, association, government agency or subdivision, or other form of enterprise.

(2) "Rubber" means compounded liquid latex which on December 11, 1941 had not been processed or mixed in such manner that further processing is necessary to prevent early spoilage, and all forms and types of crude rubber and liquid latex in crude form, and all forms of

reclaimed rubber and scrap rubber as well, but does not include balata, gutta percha, gutta siak, gutter jelutong, and pontianac.

(3) "Tire," "Casing," and "Tube" means any tire, casing and tube capable of being used on any automobile, truck, bus, motorcycle or farm implement.

(4) "New" as applied to tires, casings, and tubes, means a tire, casing or tube that has been used less than 1,000 miles.

(c) *Prohibition on deliveries of new rubber tires, casings, and tubes except to persons possessing certificates.* (1) Except as provided in this paragraph and in paragraphs (g) and (h) hereof, or in regulations hereafter issued by the Office of Price Administration, no person shall sell, lease, trade, lend, deliver, ship, or transfer new rubber tires, casings, or tubes, and no person shall accept any such sale, lease, trade, loan, delivery, shipment or transfer of any such new rubber tires, casings, or tubes. (The provisions of this paragraph shall apply to all new rubber tires, casings, and tubes, whether such new rubber tires, casings, and tubes are at the date of issuance of this Order already manufactured, or whether such new rubber tires, casings, and tubes are manufactured in the future.)

(2) Except as provided in subparagraphs (3) and (4) of this paragraph (c), a person selling new rubber tires, casings or tubes at a retail store, outlet, or premises, which for purposes of this Order shall mean a store, outlet or premises from which transfers or deliveries are made predominantly direct to consumers, may sell, lease, trade, lend, deliver, ship or transfer any new rubber tire, casing, or tube from such premises to a person possessing a certificate authorizing such purchase issued by the Office of Price Administration.

(3) Except as provided in paragraphs (f) and (g), no person (even upon the presentation of a certificate) shall sell, lease, trade, lend, deliver, ship or transfer any new six-ply or eight-ply rubber tires or casings of a size less than 7:00 x 20.

(4) Except as provided in paragraphs (g) and (h) hereof, or in regulations hereafter issued by the Office of Price Administration, no person shall sell, lease, trade, lend, deliver, ship or transfer new rubber tires, casings or tubes from a factory or warehouse or other premises not constituting a retail store, outlet or premises, even upon the presentation of a certificate, provided that a person selling exclusively to consumers, and only such a person, may transfer, or ship to his own retail premises. Authorization to make sales, leases, trades, loans, deliveries, shipments or transfers prohibited by this subparagraph (c) (4) may hereafter be granted by the Office of Price Administration. The purpose of such authorization, when granted, will be to enable dealers to replenish their inventories of new rubber tires, casings, and tubes, and in order to accomplish that purpose, permitted shipments to dealers will be based upon certificates and receipts issued pursuant to paragraphs (e), (f) and (g) of this Order and held by such dealers as evidence that new rubber tires, casings, and tubes have been sold pursuant to this Order.

(5) Anything in this paragraph (c) to the contrary notwithstanding, any dealer regularly engaged in selling new rubber tires, casings, and tubes exclusively at retail may, on and after January 5, 1942, sell such tires, casings, and tubes (without certificates) to another dealer, to the Reconstruction Finance Corporation, to the Rubber Reserve Corporation, to the Procurement Division of the United States Treasury, or (with the express approval of

the Office of Price Administration) to a manufacturer of new rubber tires, casings or tubes.

(6) Anything in this paragraph (c) to the contrary notwithstanding, any common carrier which on December 11, 1941 was in possession of shipments of new rubber tires, casings, and tubes consigned to a consignee may (without certificates) deliver such tires, casings, and tubes to such consignee.

* * * * * * * * *

(e) *Acquisition of new rubber tires, casings, and tubes by persons in the categories enumerated in List A attached hereto.* Any person who believes that the vehicle for which he wishes to acquire new rubber tires, casings, or tubes is included in one of the categories enumerated in List A attached hereto may apply to the Office of Price Administration for a certificate permitting him to purchase, lease, trade, borrow, or accept delivery, shipment or transfer of new rubber tires, casings, or tubes. Such permission may be granted by the Office of Price Administration upon a showing by the applicant of the following facts:

(1) That the vehicle on which the new rubber tire, casing, or tube is to be mounted is included in one of the categories enumerated in List A, and thus constitutes an "eligible" vehicle.

(2) That the vehicle on which the new rubber tire, casing or tube is to be mounted cannot be replaced by a vehicle owned or operated by or subject to the control of the applicant, which is equipped with serviceable tires and tubes and which is not fully employed for a use specified in one or more of the categories enumerated in List A.

(3) That the new rubber tire, casing, or tube is to be installed at once on a wheel or rim, to replace a tire, casing or tube no longer serviceable.

(4) That the tire, casing, or tube, when added to all other tires, casings, and tubes in the applicant's possession, whether unmounted or mounted on a vehicle, and when that total is applied only to eligible vehicles, does not add up to more than one spare tire, casing or tube of a given size for each eligible vehicle.

(5) That the existing tire, casing, or tube cannot be recapped, retreaded or repaired for safe use at speeds at which the applicant may reasonably be expected to operate, or that such recapping, retreading or repairing cannot be obtained without inordinate delay.

(6) That the applicant agrees to trade in replaced tires, casings, and tubes on new tires, casings, and tubes purchased under this Order, or to dispose of replaced tires, casings, and tubes as may otherwise be directed by the Office of Price Administration.

Upon being satisfied that all of these facts exist, the Office of Price Administration may issue to the applicant a certificate stating the number and type of new rubber tires, casings, and tubes which the applicant is authorized to acquire. Such certificate shall be recognized by any person having new rubber tires, casings, or tubes for sale, and no sale, lease, trade, loan, delivery, shipment or transfer of new rubber tires, casings, or tubes (except as provided in paragraphs (c), (g) and (h) hereof) shall be made except on the basis of such a certificate.

* * * * * * * * *

(g) *Sales to the Army, Navy, designated governments, and designated governmental agencies.* Nothing in this Order shall prevent any person from making a sale, lease, trade, loan, deliver, shipment or transfer of new rubber tires, casings, or tubes (without certificates) to or for the account of the following:

(1) The Army or Navy of the United States, the United States Maritime Commission, the Panama Canal, the Coast and Geodetic Survey, the Coast Guard, the Civil Aeronautics Authority, the National Advisory Commission for Aeronautics, the Office of Scientific Research and Development;

* * * * * * * * *

(h) *Sales of new rubber tires, casings, and tubes as part of the original equipment of new vehicles.* Nothing in this Order shall prevent any person from selling new rubber tires, casings, or tubes (without certificates) as part of the original equipment (excluding spares) of new vehicles, provided that such tires, casings, or tubes, are affixed to such vehicles at the time of their sale, and that such sale is not prohibited by the terms of any other order of the Office of Production Management.

(i) *Records.* All persons affected by this Order shall keep and preserve for not less than two years accurate and complete records concerning inventories, production and sales of new rubber tires, casings, and tubes, including sales covered by paragraphs (c), (g), and (h) of this Order.

(j) *Audit and inspection.* All records required to be kept by this Order shall, upon request, be submitted to audit and inspection by duly authorized representatives of the Office of Price Administration.

* * * * * * * * *

(n) *Effective date.* This order shall take effect immediately.

Issued this 27th day of December 1941

DONALD M. NELSON
Director of Priorities

Approved:
WILLIAM KNUDSEN
Director General

Approved:
SIDNEY HILLMAN
Associate Director General.

Approved:
ROBERT P. PATTERSON
Under Secretary of War.

Approved:
JAMES V. FORRESTAL
Under Secretary of the Navy.

Approved:
FRANKLIN D. ROOSEVELT
The White House

Date: December 26, 1941.

List A—Eligibility Classification

List of Vehicles Which May Be Equipped With New Rubber Tires, Casings or Tubes.

No certificate shall be issued unless the applicant for the certificate certifies that the tire, casing or tube for which application is made is to be mounted:

(a) On a vehicle which is operated by a physician, surgeon, visiting nurse, or a veterinary, and which is used principally for professional services.

(b) On an ambulance.

(c) On a vehicle used exclusively for one or more of the following purposes:

(1) To maintain fire fighting services.

(2) To maintain necessary public police service;

(3) To enforce such laws as relate specifically to the protection of public health and safety;

(4) To maintain garbage disposal and other sanitation services;

(5) To maintain mail services.

(d) On a vehicle with a capacity of ten or more passengers, operated exclusively for one or more of the following purposes:

(1) Transportation of passengers as part of the services rendered to the public by a regular transportation system;

(2) Transportation of students and teachers to and from school;

(3) Transportation of employees to or from any industrial or mining establishment or construction project, ex-

cept when public transportation facilities are readily available.

(e) On a truck operated exclusively for one or more of the purposes stated in the preceding sections or for one or more of the following purposes:

(1) Transportation of ice, and of fuel;

(2) Transportation of material and equipment for the building and maintenance of public roads;

(3) Transportation of material and equipment for the construction and maintenance of public utilities;

(4) Transportation of material and equipment for the construction of defense housing facilities and military and naval establishments;

(6) Transportation essential to render roofing, plumbing, heating and electrical repair services;

(7) Transportation by any common carrier;

(8) Transportation of waste and scrap materials;

(9) Transportation of raw materials, semi-manufactured goods, and finished products, including farm products and foods, provided that no certificate shall be issued for a new tire, casing, or tube to be mounted on a truck used (a) for the transportation of commodities to the ultimate consumer for personal, family or household use; or (b) for transportation of materials for construction and maintenance, except to the extent specifically provided by subsections (2), (3), (4), (5) and (6) of this section (e).

(f) On farm tractors or other farm implements, other than automobiles or trucks, for the operation of which rubber tires, casings, or tubes are essential.

(g) On industrial, mining and construction equipment, other than automobiles or trucks, for the operation of which rubber tires, casings, or tubes are essential.

RATIONING REGULATION No. 1

This Rationing Regulation is issued pursuant to Supplementary Order No. M-15-c of the Office of Production Management, issued December 27, 1941.

1. The Office of Price Administration may exercise through local tire rationing boards such of the powers vested in it pursuant to Supplementary Order No. M-15-c of the Office of Production Management, as it may deem necessary or desirable including without limitation on the foregoing, the following powers:

(a) The power to determine whether a given applicant is an eligible purchaser;

(b) The power to determine which of the eligible applicants shall receive tires, up to the quota allotted to the local board.

2. Each such local board shall consist of three members, and shall be called the Local Tire Rationing Board.

3. Members of Local Tire Rationing Boards shall be appointed by the Office of Price Administration, and shall hold their positions as agents of the Office of Price Administration.

4. In appointing members of Local Tire Rationing Boards, the Office of Price Administration may, in its discretion, be guided by the recommendations of State and

Local Defense Councils, and may also, in its discretion, appoint as members of such boards state and local officials.

5. Subject to such exceptions as the Office of Price Administration may make, there shall be at least one Local Tire Rationing Board in every county of the United States, and in those counties where (in the opinion of the Office of Price Administration) density of population or other factors makes it impossible for one Board adequately to administer the functions contemplated by Order No. M-15-c, there shall be as many Local Tire Rationing Boards as the Office of Price Administration may consider necessary for the adequate performance of such functions.

6. Further provisions governing the establishment and operation of Local Tire Rationing Boards may be issued by the Office of Price Administration from time to time, provided that such provisions shall be consistent with paragraph 3 of this regulation.

APPENDIX E.

TITLE 32—NATIONAL DEFENSE.

CHAPTER XI—OFFICE OF PRICE ADMINISTRATION.

Part 1315—Rubber and Products and Materials of Which Rubber is a Component

Tire Rationing Regulations

* * *

Whereas the further importations of crude rubber is imperiled, and

Whereas pursuant to sec 2(a), Public No. 671, 76th Congress, Third Session, as amended by Public No. 89, 77th Congress, First Session, and sec. 9, Public No. 783, 76th Congress, Third Session, and by Executive Order No. 8629 of January 7, 1941 and Executive Order No. 8875 of August 28, 1941 the Office of Production Management has been created and charged with certain authority and duties with regard to defense and civilian, supply, priorities and allocations, and

Whereas by Executive Order No. 8734 of April 11, 1941 the Office of Price Administration has been created and charged with certain authority and duties with regard to consumer protection, price control and the prevention of price spiraling, and

Whereas by Supplementary Order No. M-15-c of the Office of Production Management approved by the President and issued on December 27, 1941, and by Rationing Regulation No. 1 issued thereunder, the Office of Production Management has expressly vested in the Office of

Price Administration powers and duties with respect to transactions in new rubber tires, casings and tubes,

Now, therefore, by virtue of the authority vested in me by the aforesaid orders and statutes,

It is hereby ordered, That:

* * *

(f) "New" as applied to tires and tubes means a tire or tube that has been used less than 1,000 miles.

(g) "Person" means any individual, partnership, corporation, association, Government, Government agency or subdivision, or other form of enterprise.

(h) "Purchase" means purchase, lease, trade, borrow or accept delivery, shipment or transfer by gift or otherwise.

(i) "Purchaser" means a person making a purchase as defined herein.

* * *

(m) "Tire" means any solid rubber tire or, as applied to a pneumatic rubber tire, any casing, capable of being used on any automobile, truck, bus, motorcycle, or farm implement.

* * *

(o) "Tube" means any rubber tube capable of being used within a tire casing on any automobile, truck, bus, motorcycle, or farm implement.

Eligibility to Purchase or Transfer New Tires or Tubes.

§1315.401 *Permitted and prohibited transfers*—(a) *Prohibitions.* Except as provided in paragraphs (b) and (c) of this section, no person shall sell, lease, trade, lend, deliver, ship or transfer new tires or tubes, and no person shall accept any such sale, lease, trade, loan, deliver, shipment or transfer of any such new rubber tires or tubes. The word transfer includes any form of physical transfer, including gifts.

(1) The prohibition in this paragraph (a) applies both to sales and to deliveries. Except as provided by paragraphs (b) and (c), it is unlawful to deliver new tires or tubes to a person even though such person has completed and paid for the purchase or agreement for transfer of new tires or tubes from the person of whom delivery is requested.

(2) The prohibition in this paragraph (a) applies not only to the transfer of tires or tubes from one person to another, but also to the delivery by any person from a factory, warehouse, or other premises to a retail store, outlet or premises whether or not owned, operated or controlled by such person.

(3) Authorizations to manufacturers and distributors to make deliveries prohibited by this section from factories and warehouses to retail stores, outlets and premises may hereafter be granted by the Office of Price Administration. The purpose of such authorization, when granted, will be to enable dealers to replenish inventories of new tires or tubes. In order to accomplish that purpose, permitted shipments to dealers will be based upon

certificates and receipts issued pursuant to §§1315.601 to 1315.607, inclusive, and to paragraph (c) of this section of these regulations. Such certificates and receipts shall be transmitted by dealers in accordance with instructions which will hereafter be issued by the Office of Price Administration.

(4) The prohibition in this paragraph (a) applies to all new tires and tubes, whether such new tires and tubes are, at the date of the issuance of this order, already manufactured, or whether such new tires or tubes are manufactured in the future.

* * *

(2) (i) Any dealer regularly engaged in selling new tires or tubes exclusively at retail may, upon obtaining statements as specified in the following paragraph, sell new tires or tubes to (a) another dealer; (b) the Reconstruction Finance Corporation; (c) the Rubber Reserve Corporation; (d) the Procurement Divisions of the United States Treasury; or (e) a manufacturer of tires or tubes, provided that prior to a sale to a manufacturer written approval for such sale is obtained from the Office of Price Administration in Washington, D.C.

(ii) Any dealer making a sale pursuant to the preceding paragraph shall obtain, in duplicate, a statement from the purchaser, acknowledging the making of the sale, and setting forth the date of the sale, the number of tires and tubes involved, and (in the event of a sale to a manufacturer) the date of written approval by the Office of Price Administration.

(iii) Any dealer who has made sales pursuant to this paragraph (c) (2) during a calendar month shall, on the

fifth day of the following calendar month, file with the State defense council for his state a copy of all the statements, received pursuant to the preceding paragraph, covering such sales. The other copy of each such statement shall be kept by the dealer for his records.

* * *

(ii) Any person making any transfer (whether by sale, lease, trade, loan, delivery, shipment or other transfer) pursuant to the preceding paragraph, shall obtain from the purchaser, in triplicate, a receipt which acknowledges the receipt and date of receipt of the tires and tubes involved and sets forth (a) the number and sizes of the tires and tubes received; (b) the name and address of the seller; (c) the correct name of the purchaser, whether a government, government agency, corporation or other person, and the address of the purchaser; and (d) if the purchase is not made by an individual but is made on behalf of the purchaser by a person who is an officer or duly authorized agent of the purchaser, the name and position of such person. In the event of a transfer pursuant to subparagraph (3) (i) (d), to a person holding an A-3 or higher preference rating, the person making the transfer shall also obtain the statement signed by the official, which statement is referred to in subparagraph (3)(i)(d).

* * *

§1315.402 *Eligibility for certificate*— (a) *Certificate for tires and tubes not of obsolete type.* A certificate entitling the holder to acquire new tires and tubes, other than obsolete type new tires and tubes as defined in §1315.501(b) of these regulations, may be issued only to such persons as establish that they meet the requirements of both §§1315.403 and 1315.404.

* * *

§1315.403 *Establishment of need.* Except in the case of obsolete type tires or tubes, boards may issue certificates only to applicants who show:[1]

(a) That the vehicle on which the new tire or tube is to be mounted cannot be replaced by a vehicle owned or operated by or subject to the control of the applicant, which is equipped with serviceable tires and tubes and which is not fully employed for one or more of the purposes specified in §1315.404.

(1) If the applicant owns, operates, or controls vehicles equipped with serviceable tires other than the vehicle for which new tires or tubes are requested, he must show that all such other vehicles are fully employed for purposes specified in §1315.404. If an applicant fails to establish this fact, he thus fails to establish that he needs new tires or tubes to enable him to perform services within the permitted classes established by §1315.404 and he must be denied a certificate.

(b) That the new tire or tube is to be installed at once on a wheel or rim to replace a tire or tube no longer serviceable.

(1) If an applicant still has tires or tubes which are serviceable, he is not entitled to purchase new tires or tubes. If the applicant fails to establish that new tires or tubes are necessary at once to enable the applicant to continue to furnish services permitted by §1315.404, he

---

[1]The manner in which an applicant for a certificate is to make the showings required by §§1315.403 and 1315.404 is set out in §§1315.501 to 1315.503 of these regulations. To the extent that the facts required to be shown by §1315.403 can be established by inspection of tires or tubes to be replaced, such inspection is to be made in accordance with the provisions of §1315.504.

fails to establish a need for tires or tubes and must be denied a certificate.

(c) That the new tire or tube, when added to other tires or tubes in the applicant's possession, whether or not such tires or tubes are mounted on a vehicle, does not add up to more than one spare tire or tube of a given size for each eligible vehicle.

(1) No person is entitled to more tires or tubes than are absolutely necessary to operate eligible vehicles (that is, vehicles operated for the purposes specified in §1315.404). If the applicant already has enough tires to equip the vehicles to be used for purposes specified in §1315.404 whether such tires or tubes are not in use or are in use on vehicles not used for one of the purposes specified in §1315.404, the applicant fails to establish a sufficient need for tires or tubes and must be denied a certificate. Under these circumstances he can satisfy his needs by tires or tubes taken out of his stock or inventory or removed by him from vehicles not operated for purposes specified in §1315.404.

(d) That the existing tires or tubes cannot be recapped, retreaded, or repaired for safe use at speed at which the applicant may reasonably be expected to operate, or that such recapping, repairing, or retreading cannot be obtained wtihout inordinate delay.

(1) If the applicant can get his present tire retreaded, recapped or repaired without inordinate delay, he is required to do so. If he fails to establish that his old tire or tube cannot be made serviceable, he fails to establish his need for new tires or tubes and must be denied a certificate.

(2) If retreading or recapping means that the tire cannot be safely used at speeds required by an applicant, such as on a police car or ambulance, the applicant need not get his tire recapped or retreaded.

(3) Inordinate delay depends upon the facts of the case and the situation in the community. A week's delay for a normal commercial use would usually not be inordinate, while a week's delay in getting a police car into operation might be inordinate.

(e) That the applicant agrees to trade in replaced tires or tubes on new tires or tubes purchased with any certificate granted him, or if the applicant purchases a tire or tube by mail from a mail order house, that the applicant will within 5 days from receipt of such tire or tube sell the replaced tire or tube to a dealer.

(1) Unless the applicant agrees to trade in or sell his replaced tire or tube at the time when new tires or tubes are purchased, he must be denied a certificate.*

§1315.404 *Eligible vehicles.* Except in the case of obsolete type tires or tubes, the Board shall not issue a certificate unless the applicant meets all the requirements of §1315.403, and, in addition, shows that the new tire or tube for which application is made is to be mounted:

(a) On a vehicle which is operated by a physician, surgeon, or visiting nurse, or a veterinary and which is used principally for professional services.

(1) The local board shall issue certificates for vehicles in this class only to doctors, nurses and veterinaries (which for purposes of certificates shall include only farm veterinaries) whose professional practice is to make regu-

lar calls outside their offices and use automobiles to make their professional calls.

(2) No certificate shall be issued unless the doctor, nurse, or farm veterinary, applying shows that the particular car on which the tire or tube is to be mounted is actually used for professional calls and is used principally for that purpose.

(b) *On an ambulance.*

(1) A certificate for new tires or tubes may be issued for any vehicle used principally as an ambulance.

(c) On a vehicle used exclusively for one or more of the following purposes:

(1) To maintain fire fighting services.

(i) A certificate for new tires or tubes may be issued for any fire fighting apparatus, including such vehicles as ladder trucks, chemical trucks, and hose trucks.

(ii) A certificate may be issued for other kinds of cars and trucks actually used for fire fighting, including trucks without special fire fighting equipment, and passenger cars, if the Board is satisfied that the vehicles in question will be used only to fight fires, or to fight fires and to perform some other service included in this paragraph (c). A statement of the additional purposes for which the vehicle is to be used shall be stated in the application for a certificate.

(iii) No vehicle equipped with tires or tubes for which a certificate has been granted shall be used by the officials in charge of fire fighting services unless they are actually engaged in directing fire fighting work, except as provided in ii hereof.

(2) To maintain necessary public police services.

(i) In issuing certificates under paragraph (c) (2) the local board shall be governed by the necessity of keeping the uniformed force and essential nonuniformed personnel of any Federal, State, or local police force in a position to render efficient service in the prevention and detection of crime.

(ii) Certificates shall not be issued for vehicles to perform police services, if such services can be performed without the use of motor vehicles. No police department shall use motor vehicles equipped with tires or tubes for which a certificate has been issued for licensing or inspection duties, when regular public transportation will serve.

(iii) No vehicle equipped with tires or tubes for which a certificate has been issued shall be used to convey police officials to or from their usual stations, except in case of emergency, nor shall such vehicles be used for official convenience. when public means of transportation will serve.

(iv) Vehicles for which certificates are issued under this paragraph (c) (2) may be used for any other purpose in this paragraph (c), but a statement of the additional purposes for which the vehicle is to be used shall be included in the application.

(3) To enforce such laws as relate specifically to the protection of public health and safety.

(i) Certificates shall be issued under this paragraph (c) (3) only for vehicles essential for the performance of the law enforcement services specifically provided for by this paragraph. The inspection of buildings, of the establishments of sellers and producers of food, and the

discharge of similar duties do not in most instances require the use of motor vehicles. Certificates shall under no circumstances be issued for vehicles for the performance of services which can be performed satisfactorily by inspectors and other officers using means of transportation available to the general public.

(ii) This paragraph provides only for law enforcement services which relate directly to the protection of the public from accident and disease. New tires or tubes are not to be made available for any law enforcement functions other than those performed by the regular police force, as provided in the preceding paragraph (c) (2), and the protection of the public health and safety, provided for by paragraph (c) (3).

(iii) No vehicle equipped with tires or tubes for which a certificate has been issued shall be used to convey public health and safety officials to and from their usual stations, except in case of emergency or for official convenience, when public means of transportation will serve.

(iv) Vehicles for which certificates are issued under this paragraph (c) (3) may be used for any other purpose, stated in this paragraph (c), but a statement of the additional purposes for which the vehicle is to be used shall be included in the application.

(4) To maintain garbage disposal and other sanitation services.

(i) Certificates for new tires or tubes may be issued for any vehicle essential to dispose of refuse of various kinds, to operate sewage systems, and for similar purposes.

(ii) No certificate shall be issued for passenger cars to be used by administrative personnel concerned with gar-

bage disposal or sanitation services, except to the extent provided in paragraph (c) (3). New tires or tubes shall be issued only for vehicles actually used to transport garbage and other refuse, to clean and repair sewers, and for similar purposes.

(iii) Vehicles for which certificates are issued under this paragraph (c) (4) may be used for any other purpose stated in this paragraph (c), but a statement of the additional purposes for which the vehicle is to be used shall be included in the application.

(5) To maintain mail services.

(i) The local boards may issue certificates for vehicles to be used for the transportation of mail by, or under a contract with, the United States.

(ii) A vehicle equipped with tires or tubes for which a certificate has been issued under this paragraph (c) (5) may be used for any of the other purposes in this paragraph (c) but a statement of the additional purposes for which the vehicle is to be used shall be included in the application for a certificate.

(d) On a vehicle, with a capacity of 10 or more passengers, operated exclusively for one or more of the following purposes,

(1) Transportation of passengers as part of the services rendered to the public by a regular transportation system.

(i) Certificates may be issued under this paragraph (d) (1) only for vehicles, performing necessary transportation service along regular routes or with regular schedules, from which the general public may obtain service upon payment of a standard fare.

(ii) No certificate shall be issued for a vehicle on which the general public cannot obtain transportation, except to the extent provided for in paragraphs (d) (2) and (d) (3).

(iii) Vehicles for which certificates are issued under this paragraph (d) (1) may be used for any other purpose in this paragraph (d) but a statement of the additional purposes for which the vehicle is to be used shall be included in the application.

(2) Transportation of students and teachers to and from school.

(i) Certificates shall be issued under this paragraph (d) (2) only for school busses. A school bus will not lose its character as such because it is used to transport other employees of the school as well as teachers.

(ii) No vehicle equipped with tires or tubes for which certificates have been granted shall be used for excursions of any character. Transportation shall be provided only from the homes of students and teachers or from regular school bus stops to the regular places of instruction.

(iii) Vehicles for which certificates are issued under this paragraph (d) (2) may be used for any other purpose stated in this paragraph (d), but a statement of the additional purposes for which the vehicle is to be used shall be included in the application.

(3) Transportation of employees to or from any industrial or mining establishment or construction project, except when public transportation facilities are readily available.

(i) Certificates shall be issued under this paragraph (d) (3) only for busses used to transport workers to

places of employment which cannot be easily reached by means of transportation available to the public. No certificate shall be issued where the workers can conveniently reach the place of employment, or go from place to place while on the job, by using public transportation facilities.

(ii) The local boards may issue certificates under this paragraph (d) (3) where, although public transportation facilities exist, such facilities are inadequate to provide reliable and rapid transportation essential to uninterrupted production.

(iii) Vehicles for which certificates are issued under this paragraph (d) (3) may be used for any other purpose stated in this paragraph (d), but a statement of the additional purposes for which the vehicle is to be used shall be included in the application.

(e) On a truck operated exclusively for one or more of the purposes stated in the preceding sections or for one or more of the following purposes:

(1) Transportation of ice and of fuel.

(i) In issuing certificates under this paragraph (e) (1), the local board shall be governed by the necessity for preserving public health and maintaining industrial production.

(iii) A truck for which certificates are issued under this paragraph (e) (1) may be used for any other purpose stated in this paragraph (e) or for any of the purposes stated in paragraphs (a), (b), (c), and (d), but a statement of the additional purposes for which the truck is to be used shall be included in the application for a certificate.

(2) Transportation of material and equipment for the building and maintenance of public roads.

(i) Because of the importance of public roads to the functioning of the industrial and military system, certificates may be issued for trucks, snow plows and similar equipment to be used for the building and maintenance of public roads.

(ii) A truck for which a certificate is issued under this paragraph (e) (2) may be used for any other purpose stated in this paragraph (e), or for any of the purposes stated in paragraphs (a), (b) (c), and (d), but a statement of the additional purposes for which the truck is to be used shall be included in the application for a certificate.

(3) Transportation of material and equipment for the construction and maintenance of public utilities.

(i) For the purposes of this subsection the term "public utilities" shall include gas, electric, and water supply systems, telephone and telegraph systems, transportation systems the facilities of which are available to the general public (railroads, airlines, street car lines, etc.) and similar public service institutions, whether publicly or privately operated.

(ii) Certificates may be issued for any truck used to transport supplies, material and equipment for the construction, maintenance and repair of public utilities, as defined above.

(iii) A truck for which a certificate is issued under this paragraph (e) (2) may be used for any other purpose stated in this paragraph (e), or for any of the purposes stated in paragraphs (a), (b), (c), and (d), but a state-

ment of the additional purposes for which the truck is to be used shall be included in the application for a certificate.

(4) Transportation of material and equipment for the construction and maintenance of production facilities.

(i) In issuing certificates under this paragraph (e) (4), the local board is to adhere strictly to the requirement that trucks are to be granted new tires or tubes only to transport materials, supplies, and equipment for the construction and maintenance of factories, mines and similar production establishments.

(ii) A truck for which a certificate is issued under this paragraph (e) (4) may be used for any other purpose stated in this paragraph (e), or for any of the purposes stated in paragraphs (a), (b), (c), and (d), but a statement of the additional purposes shall be included in the application for a certificate.

(5) Transportation of material and equipment for the construction of defense housing facilities and military and naval establishments.

(i) Certificates may be issued under this paragraph (e) (5) for trucks not owned by the Army or Navy to be used in the construction of new housing facilities, to be occupied principally by workers in defense plants, and in the construction of cantonments, navy yards, docks and other military and naval establishments directly controlled by the armed forces of the United States.

(ii) A truck equipped with tires or tubes for which a certificate has been issued under this paragraph (e) (5) may be used for any of the purposes stated in paragraphs (a), (b), (c), and (d) but a statement of the additional

purposes shall be included in the application for a certificate.

(6) Transportation essential to render roofing, plumbing, heating, and electrical repair services.

(i) Certificates may be issued for trucks to be used in rendering these essential repair services: roofing, plumbing, heating, and electrical repair services. These services may be performed on any buildings and houses whether or not designated in paragraph (c) (5) or elsewhere in this section.

(ii) A truck equipped with tires or tubes for which a certificate has been issued under this paragraph (e) (6) may be used for any other purpose stated in this paragraph (e) or for any of the purposes stated in paragraphs (a), (b), (c), and (d), but a statement of the additional purposes for which the truck is to be used shall be included in the application for a certificate.

(7) Transportation by any common carrier.

(i) For the purpose of this paragraph (e) (7), the term "common carrier" shall include any carrier of freight by rail, motor, or water (using trucks to render a part of its services), required by law to furnish services to the general public at standard rates, fixed in advance.

(ii) For the purpose of this paragraph (e) (7), the term "common carrier" shall not include any carrier which renders services only to persons whom it chooses as its customers or on terms separately arranged for each customer, and for each service it renders.

(iii) A certificate may be issued for any truck used by a common carrier to render freight services.

(iv) A vehicle for which a certificate is issued under this paragraph (e) (7) may be used for any other purpose stated in this paragraph (e) or for any of the purposes stated in paragraphs (a), (b), (c), and (d), but a statement of the additional purposes for which the vehicle is to be used shall be included in the application for a certificate.

(8) Transportation of waste and scrap materials.

(i) Certificates may be issued under this paragraph (e) (8) for trucks which are to be used for transporting waste and scrap materials, including waste paper, scrap-iron, scrap rubber, and similar commodities which may be reused in production.

(ii) A vehicle equipped with tires or tubes for which a certificate has been issued under this paragraph (e) (8) may be used for any other purpose stated in this paragraph (e), or for any of the purposes stated in paragraphs (a), (b), (c), and (d), but a statement of the additional purposes for which the vehicle is to be used shall be included in the application for a certificate.

(9) Transportation of raw materials, semimanufactured goods, and finished products, including farm products and foods, provided that no certificate shall be issued for a new tire or tube to be mounted on trucks used (a) for the transportation of commodities to the ultimate consumer for personal, family, or household use; or (b) for transportation of materials for construction and maintenance except to the extent specifically provided by paragraphs 2, 3, 4, 5, and 6 of this paragraph (e).

(i) Certificates may be issued for trucks used to transport raw materials, semimanufactured goods, and finished products, including farm products and foods, except (a)

transportation of commodities to the ultimate consumer for personal, family, or household use; and (b) transportation of materials for construction and maintenance except to the extent provided by paragraphs 2, 3, 4, 5, and 6 of this paragraph (e).

(ii) No truck equipped with tires or tubes for which a certificate has been issued shall be used to deliver milk or other foods to a consumer for personal, family, or household use, or to make such deliveries of other commodities for a department store, grocery store, or similar sales outlet.

(iii) No truck equipped with tires or tubes for which a certificate has been issued shall be used for the transportation of materials for construction or maintenance except to the limited extent provided in paragraphs 2, 3, 4, 5, and 6 of this paragraph (e).

(iv) A truck for which a certificate has been issued under this paragraph (e) (9) may be used for any other purpose stated in this paragraph (e) or for any of the purposes stated in paragraphs (a), (b), (c), and (d), but a statement of the additional purposes for which the truck is to be used shall be included in the application.

(f) On farm tractors or other farm implements, other than automobiles or trucks, for the operation of which rubber tires or tubes are essential.

(1) Certificates may be granted for farm tractors and other farm implements for the operation of which rubber tires or tubes are essential.

(2) Nothing in this paragraph (f) shall be construed to permit the issuance of a certificate for rubber tires or tubes when the tractor or other implement can operate or can be adapted to operate without such tires or tubes.

(g) On industrial, mining, and construction equipment, other than automobiles or trucks, for the operation of which rubber tires, casings or tubes are essential.

(1) Certificates may be issued for industrial, mining, and construction equipment, including such equipment as derricks, bulldozers, and drills, for the operation of which rubber tires or tubes are essential.

(2) Nothing in this paragraph (g) shall be construed to permit the issuance of a certificate when the equipment can operate or can be adapted to operate without such tires or tubes.

Applications for Certificates

§1315.501 *Application for authority to purchase tire or tube.* (a) Any person who believes that his vehicle comes within one of the classifications set forth in §1315.404 may file with the Board an application for authority to purchase new tires or tubes not of an obsolete type.

* * *

§1315.508 *Notation of reasons for action.* When the Board determines that an application shall be granted, the reasons therefor shall be noted upon the application, together with the number of new tires and tubes allotted to the applicant.

In all cases where an application is refused, the reasons for such refusal shall be noted upon the application.

TIRE AND TUBE CERTIFICATES

§1315.601 *Notification.* After acting upon an application the Board shall notify the applicant of its decision. In cases where the Board authorizes an applicant to purchase new tires or tubes, the Board shall immediately issue to such applicant a nontransferable certificate for the purchase of new tires and tubes. No certificate shall be issued authorizing the purchase of more tires or tubes than have been allotted for one vehicle by the Board.

§1315.602 *Form of certificate.* (a) The nontransferable certificate for the purchase of new tires and tubes is O. P. A. Form No. R-2, a copy of which is set forth in the appendix to these Regulations.[2] The certificates shall be serially numbered and shall be divided into four parts each bearing the same serial number; (1) a part to be retained by the dealer as a record which shall be designated as part A; (a) a part to be retained by the dealer as the basis for replenishing his stocks which shall be designated as part B; (3) a part to be forwarded by the dealer to the Board which has issued the certificate, which shall be designated as part C; and (4) a part to be given by the dealer to the purchaser, which shall be designated as part D.

* * *

§1315.803 *Records to be kept by dealers.* (a) Every person selling new tires or tubes shall: (1) On January 31, 1942, and at the close of business on the last day of every month thereafter (in adition to the report on Form PD-216,[3] required to be filed on December 31, 1941), take

---

[2]See note at end of document.

[3]Form PD-216, Office of Production Management, headed: Dealers' Report of Stocks of New Tires and Tubes of Any Description on Hand on December 12, 1941.

an inventory of all new tires and tubes in his possession or control, and keep a record thereof; (2) maintain a file containing all certificates which have been presented by applicants to whom sales of new tires and tubes have been made; (3) prepare reports requested by the Board in his area and by the Office of Price Administration.

§1315.804 *Replenishment of stocks.* Dealers shall hold a copy of all receipts and statements received pursuant to §1315.401 (c)(3) and shall hold all parts of certificates received (O. P. A. Form R-2, part B), and transmit them only in accordance with instructions of the Office of Price Administration, which will hereafter be issued.

* * *

§1315.806 *Preservation of records.* All persons shall keep records in accordance with the requirements elsewhere provided in these regulations for the keeping of records. In addition, all persons affected by these regulations shall keep and preserve for not less than 2 years accurate and complete records concerning inventories, production and sales of new tires and tubes, and shall make them available at all times for inspection by the Office of Price Administration.

(Information concerning Forms R-1, R-2, or R-3, which were filed as part of the original document, may be obtained by addressing the Office of Price Administration.)

Issued this 30th day of December, 1941.

These Regulations shall become effective this 30th day of December, 1941.

LEON HENDERSON,
Administrator.

(F. R. Doc. 41-9875; Filed December 30, 1941; 4-26 p. m.)

APPENDIX F.

Executive Order 9024.

Establishing the War Production Board in the Executive Office of the President and Defining Its Functions and Duties.

By virtue of the authority vested in me by the Constitution and statutes of the United States, as President of the United States and Commander in Chief of the Army and Navy, and in order to define further the functions and duties of the Office for Emergency Management with respect to the state of war declared to exist by Joint Resolutions of the Congress, approved December 8, 1941, and December 11, 1941, respectively, and for the purpose of assuring the most effective prosecution of war procurement and production, it is hereby ordered as follows:

1. There is established within the Office for Emergency Management of the Executive Office of the President a War Production Board, hereinafter referred to as the Board. The Board shall consist of a Chairman, to be appointed by the President, the Secretary of War, the Secretary of the Navy, the Federal Loan Administrator, the Director General and the Associate Director General of the Office of Production Management, the Administrator of the Office of Price Administration, the Chairman of the Board of Economic Warfare, and the Special Assistant to the President supervising the defense aid program.

2. The Chairman of the War Production Board, with the advice and assistance of the members of the Board, shall:

a. Exercise general direction over the war procurement and production program.

b. Determine the policies, plans, procedures, and methods of the several Federal departments, establishments, and agencies in respect to war procurement and production, including purchasing, contracting, specifications, and construction; and including conversion, requisitioning, plant expansion, and the financing thereof; and issue such directives in respect thereto as he may deem necessary or appropriate.

c. Perform the functions and exercise the powers vested in the Supply Priorities and Allocations Board by Executive Order No. 8875 of August 28, 1941.

d. Supervise the Office of Production Management in the performance of its responsibilities and duties, and direct such changes in its organizaiton as he may deem necessary.

e. Report from time to time to the President on the progress of war procurement and production; and perform such other duties as the President may direct.

3. Federal departments, establishments, and agencies shall comply with the policies, plans, methods, and procedures in respect to war procurement and production as determined by the Chairman; and shall furnish to the

Chairman such information relating to war procurement and production as he may deem necessary for the performance of his duties.

4. The Army and Navy Munitions Board shall report to the President through the Chairman of the War Production Board.

5. The Chairman may exercise the powers, authority, and discretion conferred upon him by this Order through such officials or agencies and in such manner as he may determine; and his decisions shall be final.

6. The Chairman is further authorized within the limits of such funds as may be allocated or appropriated to the Board to employ necessary personnel and make provision for necessary supplies, facilities, and services.

7. The Supply Priorities and Allocations Board, established by the Executive Order of August 28, 1941, is hereby abolished, and its personnel, records, and property transferred to the Board. The Executive Orders No. 8629 of January 7, 1941, No. 8875 of August 28, 1941, No. 8891 of September 4, 1941, No. 8942 of November 19, 1941, No. 9001 of December 27, 1941, and No. 9023 of January 14, 1942, are hereby amended accordingly, and any provisions of these or other pertinent Executive Orders conflicting with this Order are hereby superseded.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
January 16, 1942.

APPENDIX G.

Executive Order 9040.

Defining Additional Functions and Duties of the War Production Board.

By virtue of the authority vested in me by the Constitution and the statutes, as President of the United States and Commander in Chief of the Army and Navy, and for the purpose of assuring the most effective prosecution of war procurement and production, it is hereby ordered as follows:

1. In addition to the responsibilities and duties described in paragraph 2 of Executive Order No. 9024, of January 16, 1942, the Chairman of the War Production Board, with the advice and assistance of the members of the Board, shall:
   a. Perform the functions and exercise the powers heretofore vested in the Office of Production Management.
   b. Perform the functions and exercise the powers vested in the Supply Priorities and Allocations Board by Executive Order No, 8942 of November 19, 1941.
   c. Perform the functions and exercise the authority vested in the President by Section 120 of the National Defense Act of 1916, (39 Stat. 213).
2. Paragraph 1 of said Executive Order No. 9024 of January 16, 1942, is amended to provide that the Lieutenant General in charge of War Department Production, and the Director of the Labor

Division of the War Production Board shall be members of the War Production Board vice the Director General and Associate Director General of the Office of Production Management.

3. The Chairman of the War Production Board may exercise the powers, authority, and discretion conferred upon him by this or any other Order through such officials or agencies and in such manner as he may determine; and his decisions shall be final.

4. The Office of Production Management, established by Executive Order No. 8629 of January 7, 1941, is abolished and its personnel, records, property, and funds are transferred to the War Production Board.

5. Executive Order No. 8629, of January 7, 1941, is rescinded, and Executive Order No. 9024, of January 16, 1942, and any other Executive Orders the provisions of which are inconsistent with the provisions of this Order, are amended accordingly.

(signed) Franklin D. Roosevelt

The White House
January 24, 1942.

APPENDIX H.

Directive 1
Sept. 30, 1942

War Production Board

Part 903—Delegations of Authority

[Directive 1 as of September 30, 1942]

DELEGATION OF AUTHORITY TO THE OFFICE OF PRICE ADMINISTRATION WITH RESPECT TO RATIONING

Pursuant to the authority vested in me by Executive Order No. 9024 of January 16, 1942, and Executive Order No. 9040 of January 24, 1942, and in order to delegate to the Office of Price Administration authority to provide for the equitable rationing of products at the retail level, *It is hereby ordered,* That:

§ 903.1. *Directive 1.* (a) The Office of Price Administration is authorized and directed to perform the functions and exercise the power, authority and discretion conferred upon the President by section 2 (a) of the Act of June 28, 1940 (Pub. Law 671, 76th Cong., 54 Stat. 676) as amended by the Act of May 31, 1941 (Pub. Law 89, 77th Cong., 55 Stat. 236) with respect to the exercise of rationing control over (1) the sale, transfer or other disposition of products by any person who sells at retail to any person, and (2) the sale, transfer or other disposition of products by any person to an ultimate consumer. The term "ultimate consumer," as used by this directive, means a person acquiring products for the satisfaction of personal needs as distinguished from one acquiring products for industrial or other business purposes. The term "person", as used in this directive, includes an

individual, partnership, association, business trust, corporation or any organized group of persons, whether incorporated or not: *Provided,* That in no event shall this paragraph (a) be deemed to authorize the Office of Price Administration to control the acquisition of products by or for the account of any of the following:

(1) The Army or Navy of the United States, the United States Maritime Commission, The Panama Canal, the Coast and Geodetic Survey, the Coast Guard, the Civil Aeronautics Authority, the National Advisory Commission for Aeronautics and the Office of Scientific Research and Development; or

(2) Government agencies or other persons acquiring such products for export to and consumption or use in any foreign country.

(b) The authority of the Office of Price Administration under this directive shall include the power to regulate or prohibit the sale, transfer or other disposition of products to any retailer who has acted in violation of any rationing regulation or order prescribed by the Office of Price Administration hereunder, and shall include the power to regulate or prohibit the sale, transfer or other disposition of products to any wholesaler or other supplier of any retailer, directly or indirectly, if such wholesaler or other supplier has acted in violation of any rationing regulation or order prescribed by the Office of Price Administration hereunder. The Office of Price Administration is likewise authorized to require such reports and the keeping of such records, and to make such investigations, as it may deem necessary or appropriate for the administration of the rationing powers conferred

herein; and it may take such measures as it may deem necessary or appropriate for the enforcement of any rationing regulation or order prescribed by it pursuant to this directive.

(c) The Office of Price Administration may exercise the power, authority and discretion conferred upon it by this directive through such officials, including part time and uncompensated special agents, and in such manner as it may determine.

(d) The Chairman of the War Production Board will, on request of the Office of Price Administration, advise the Office of Price Administration as to the portion of existing products available for rationing by the Office of Price Administration under this directive.

(e) The Chairman of the War Production Board may from time to time delegate to the Office of Price Administration such additional powers with respect to the exercise of rationing control, or amend the delegation herein in such manner and to such extent, as he may determine to be necessary or appropriate.

(f) Nothing herein shall be construed to limit or modify any order heretofore issued by the Director of Priorities of the Office of Production Management, nor to delegate to the Office of Price Administration the power to extend, amend or modify any such order.

(E.O. 9024, Jan. 16, 1942, 7 F.R. 329, E.O. 9040, Jan. 24, 1942, 7 F.R. 527; sec. 2 (a), Pub. Law 671, 76th Cong., as amended by Pub. Law 89, 77th Cong.)

Issued January 24, 1942.

APPENDIX I.

PART 1315—RUBBER AND PRODUCTS AND MATERIALS OF WHICH RUBBER IS A COMPONENT

REVISED TIRE RATIONING REGULATIONS—

TIRES AND TUBES, RETREADING AND RECAPPING OF TIRES, AND CAMELBACK

Pursuant to the authority vested in me by Supplementary Order No. M-15-c of the Office of Production Management, issued December 27, 1941, and by Rationing Regulation No. 1 thereunder, and by War Production Board Directive No. 1, issued January 24, 1942, and by Supplementary Directive No. 1B, issued February 2, 1942.

It is hereby ordered, That:

* * *

Tire and Tube Quota

§ 1315.301 *Prohibition.* (a) The Office of Price Administration shall fix quotas stating the maximum number of new tires and tubes and retreaded or recapped tires for the purchase of which certificates may be issued by Boards during a single calendar month. No Board shall issue a certificate for the purchase of a new tire or tube or a retreaded or recapped tire in excess of its quota.

(b) Boards may issue certificates for the purchase of new passenger tires of an obsolete type as defined in paragraph (d) of § 1315.503 of these regulations (§§ 1315.151 to 1315.1199, incl.), without regard to their quotas.

* * *

Tires and Tubes for Vehicles Eligible Under List "A"

§ 1315.401 *Permitted and prohibited transfers and deliveries to consumers*—(a) *Prohibitions.* Except as provided in paragraphs (b) and (c) of this section, and in §§ 1315.801 to 1315.805, incl., of these regulations, (§§ 1315.151 to 1315.1199, incl.), no person shall make any transfer of new tires or tubes, or delivery of retreaded or recapped tires, to a consumer; and no consumer shall accept any such transfer or delivery.

(1) The prohibition in paragraph (a) of this section applies to sales and deliveries and physical transfers involving a change either in use or location as set forth in § 1315.801. Except as provided in paragraphs (b) and (c) of this section and in §§ 1315.801 to 1315.805, incl., it is unlawful to deliver new tires or tubes, or retreaded or recapped tires, to a consumer, even though such consumer has completed and paid for the purchase or agreement for transfer of such tires or tubes from the person of whom delivery is requested.

(2) The prohibition in paragraph (a) of this section applies to new tires or tubes whether such tires or tubes are at the date of the issuance of these regulations already manufactured or whether such tires or tubes are manufactured in the future, and applies to retreaded or recapped tires whether such tires are retreaded or recapped at the date of the issuance of these regulations (§§ 1315.151 to 1315.1199, incl.), or whether such tires are retreaded or recapped in the future.

(3) Until February 19, the effective date of these regulations (§§ 1315.151 to 1315.1199, incl.), any consumer may obtain any retreaded or recapped tire from

any person, including tires which he left to be retreaded or recapped on his behalf. After February 19 no consumer may accept delivery of a retreaded or recapped tire except in exchange for a certificate issued pursuant to these regulations (§§ 1315.151 to 1315.1199, incl.), whether or not he provided the tire carcass to be retreaded or recapped, but he may accept redelivery of such tire carcass if it has not been retreaded or recapped.

(b) *Transfers of new tires or tubes to consumers.* (1) Any retailer or distributor may transfer a new tire or tube to any consumer in exchange for a certificate authorizing such purchase issued by a Board.

(2) Any wholesaler may transfer any new tire or tube to a consumer in exchange for a certificate authorizing such purchase issued by a Board: *Provided*, That such consumer purchased, leased, or otherwise acquired new rubber tires or tubes direct from such wholesaler's warehouse during the calendar year 1941.

(i) The restriction set forth in paragraph (b) (2) shall apply only when the wholesaler sells such tires directly from his wholesale warehouse. It shall not apply when the wholesaler makes such sale to a consumer from the separate premises of its company-owned retail outlet.

(3) Any manufacturer may transfer any new tires or tubes to a consumer in exchange for a certificate authorizing such purchase issued by a Board: *Provided*, That such consumer purchased or leased new rubber tires or tubes direct from such manufacturer's factory or warehouse during the calendar year 1941.

(i) The restrictions set forth in paragraph (b) (3) shall apply only when the manufacturer sells such tire or tube directly from his factory or warehouse. It shall not

apply when the manufacturer makes such sale to a consumer from the separate premises of its company-owned retail outlet.

* * *

(c) An applicant must establish:

(1) That the passenger automobile upon which the tire or tube is to be mounted cannot be replaced by a passenger automobile owned or operated by, or subject to the control of the applicant, which is equipped with serviceable tires or tubes and which is capable of being, but is not, fully employed for one or more of the purposes specified in paragraphs (a) to (d) of § 1315.405.

(i) If the applicant owns, operates, or controls passenger automobiles equipped with serviceable tires or tubes, other than the passenger automobile for which new tires or tubes are requested, he must show that all such vehicles capable of being employed for the purposes for which tires are sought are fully employed for one or more of the purposes specified in paragraphs (a) to (d) of § 1315.405. If an applicant fails to establish that fact, he fails to establish that he needs tires or tubes for the purposes listed in those paragraphs, and he must be denied a certificate.

(2) That the tire or tube for which application is made is to replace a tire or tube used by the applicant and that such tire is not serviceable or must be recapped or retreaded without delay, or that such tube cannot be repaired: *Provided,* That the applicant need not show that the tire for which application is made is for replacement purposes when application is made for one spare of a given size as original equipment for a vehicle included in paragraphs (a) to (d) of § 1315.405.

* * *

Transfers and Deliveries of New Tires and Tubes, Retreaded or Recapped Tires and Camelback

§ 1315.801 *Permitted and prohibited transfers of new tires and tubes*—(a) *Prohibitions.* Except as provided in §§ 1315.401, 1315.804, and paragraphs (c), (d), (e), and (f) of this section of these regulations (§§ 1315.151 to 1315.1199, incl.) no person shall transfer a new tire or tube, and no person shall accept any such transfer of a new tire or tube.

(1) The word "transfer" is very broadly defined. It includes not only transfers by a sale, lease, or trade of a new tire or tube, but also by gift from one person to another and includes the transfer of any legal or equitable right or interest in any tire or tube. Again, it applies to any transfer from one person to another even though no change in "title" is involved. For example, unless expressly authorized by these regulations, transfers may not be made of new tires or tubes to a person by a dealer even though the person had previously bought and paid for the tires or tubes. Similarly, tires or tubes imported into this country and held in customs at a point of entry may not be released to the claimant unless he is authorized by these regulations to accept them.

(2) Unless specifically exempted, all physical transfers involving a change in the location or use of tires or tubes are included. Thus, if a dealer in tires or tubes removes a tire from his stock and mounts it on a vehicle owned by him, a transfer has occurred within the meaning of these regulations. Furthermore, a change in physical location involving a movement of a tire from one establishment to another is a transfer, although routine shifts in stock within a single building are not transfers within

these regulations. It should be noted, however, that freedom to move tires and tubes is expressly permitted by paragraph (c) of this section in a wide number of cases.

(3) The prohibition in this paragraph (a) applies to all new tires and tubes whether such new tires and tubes are at the date of this order already manufactured or whether such new tires and tubes are manufactured in the future.

(b) *Restriction on transfers from stocks to vehicles.* (1) Except as provided in subparagraph (2) of this paragraph (b) no person who on December 11, 1941, or at any time thereafter was a retailer, distributor, wholesaler, or manufacturer of new tires or tubes may mount any new tire or tube on any vehicle owned, operated, or controlled by him or otherwise transfer such tire or tube to his own use unless such person possesses a certificate issued to him by a Board authorizing him to purchase or otherwise acquire such tire or tube for the vehicle upon which it is to be mounted. The instructions set forth in §§ 1315.705 and 1315.706 in regard to the certificate should be followed.

* * *

(c) *Permitted transfers by certain persons.* (1) Except as provided in paragraph (b) of this section, any person who on December 11, 1941 was not a retailer, distributor, wholesaler, or manufacturer may transfer any new tire or tube which was owned and physically possessed by him prior to December 11, 1941, including the placing of such tire or tube upon the wheel or rim of any vehicle owned or operated by him, provided no change in ownership, possession, or control occurs.

* * *

Effective Dates.

§ 1315.1199 *Effective dates of Tire Rationing Regulations.* (a) The Tire Rationing Regulations (§§ 1315.151 to 1315.904, inclusive) shall become effective this 30th day of December, 1941.

(b) These Revised Tire Rationing Regulations (§§ 1315.151 to 1315.1199, inclusive) shall become effective February 19, 1942, except that the provisions of § 1315.803 (b) shall become effective February 16, 1942.

(c) These Revised Tire Rationing Regulations (§§ 1315.151 to 1315.1199, inclusive) supersede the provisions of Sup. Order No. M-15-c, 6 F. R. 6792, December 30, 1941, as amended (7 F. R. 121, 350, 434, 474, January 6, 17, 21, 23, 1942) and the Tire Rationing Regulations, 7 F. R. 72, December 30, 1941, as amended (7 F. R. 257, January 14, 1942) in so far as they may be inconsistent therewith: *Provided, however,* That any violations occurring prior to the effective dates of these Revised Tire Rationing Regulations shall nevertheless be governed by the Sup. Order and Regulations, or amendments thereto, in effect at the time of said violations.

Issued this 11th day of February 1942.

LEON HENDERSON,
Administrator.

(F. R. Doc. 42-1336; Filed, February 13, 1942; 5:18 p. m.)